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# INDIA, A FEDERATION?

Being a survey of the principal  
Federal Constitutions of the  
World, with special reference to  
the relations of the Central to  
the Local Governments in India

BY

206887  
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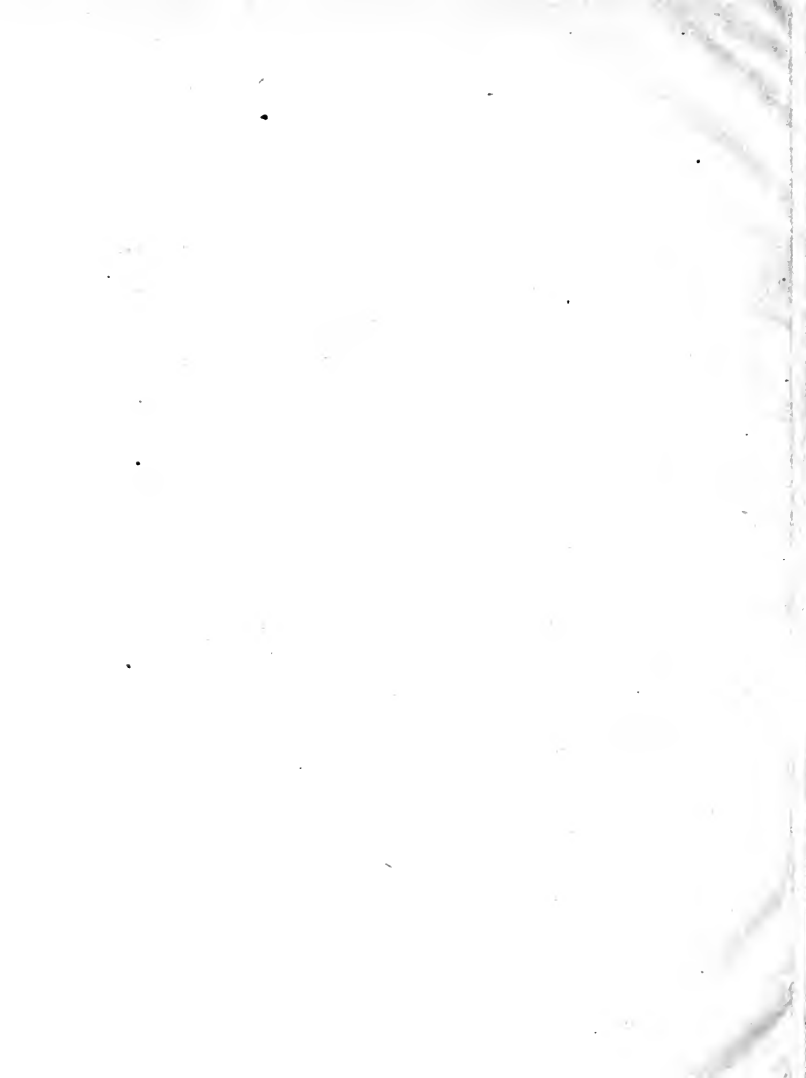
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*First President of the Legislative Assembly.*

*Price Rs. 2/8 or 4s.*

1884

This monograph was prepared by Sir Frederick Whyte, K.C.S.I., at the request of the Government of India. It is now made available in a convenient form in the hope that it will place in the hands of the public an interesting examination, illustrated by historical references, of a problem which is of great practical importance in modern India. The detached position which the author occupied during his stay in India adds to the interest of the opinions expressed therein. But although the monograph was prepared at the request of the Government of India, the views are entirely those of the author.

To Sir Frederick Whyte the thanks of the Government of India are due for the completion of his task within the very limited time which was at his disposal.



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# INDIA, A FEDERATION?

## CHAPTER I.

### PREFATORY AND EXPLANATORY.

The monograph here presented is limited in scope. It offers only some of the constitutional and historical material necessary for a comparison of the relations between the Central and Local Governments in India with similar relations ob-

taining in countries governed by Federal Constitutions. It does not purport to make a complete examination of provincial autonomy in India, but to place the contemporary facts of the Indian Constitution alongside of the seven principal Federal Constitutions of the world as a study in comparative politics.

In the time available and with the material immediately at my disposal, I have not been able to expand this monograph to the fullness which the subject deserves. Any claim to completeness which the monograph may possess is due to the fact that the Home Member and the

Finance Member have unstintedly placed their wide Indian and European experience, respectively, at my disposal, and that the Home Department and the Legislative Department have provided me with assistance both in documents and in personnel, without which these pages could not have been prepared in so short a time. Since that time was little more than two months, I hope I may plead the fact in my favour against those who will all too easily find errors, both of omission and of commission, in the following pages. At the same time, I hope that this monograph, however incomplete and however out of focus it may appear, will provide some material for the student of Indian Constitutional Reform.

The amplitude of the problem to which this monograph is a mere footnote is not always fully realised by those who discuss the political future of India. The Government of India in inviting me to undertake the composition of these chapters

*Lessons may be learned elsewhere than in England.* made me aware of their growing concern in this matter and impressed upon me the importance of showing to the Indian public generally the complexity and magnitude of the problems which the makers of other Federal Constitutions had

solved. That there are lessons to be learned from other countries is obvious. We go to foreign experience because we are not arrogant enough to suppose that our institutions are the last word in perfection or ignorant enough to deny that the peculiarities of India may find parallels in lands other than Britain, where differing circumstances have turned political progress away from the road followed by the Imperial Parliament. The essence of politics in England lies less in tangible institutions than in the men who operate them, and both the institutions themselves and the manner of their operation are so distinctively and characteristically British that the growth of a particular political temperament, in any who would imitate England, is the prior condition of success. Now, as tangible institutions are a necessary part of a Federal Constitution and as Britain offers no great variety of such political institutions to the scrutiny of the student, albeit a rich harvest in political expedients which sometimes do the work of national institutions, they must be sought for the most part in other countries. In the search for working models, it is certain that there is much to be gleaned for India from the actual relations of Central and Local Governments in all Federal systems. It may also be that, whatever lessons

England and India may have taught one another or learned together, the time is at hand when a closer study of other Constitutions may provide palatable solutions for problems which now appear well-nigh insoluble. Indeed, once we admit that the British practice of democracy and responsible government is not necessarily appropriate to any other country, and perhaps particularly to an eastern country, we widen the area of political exploration and open new vistas of suggestion and experiment.

If this monograph opens a window towards any of these new vistas, its author may claim that his work has not been wholly in vain.

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## CHAPTER II.

## NATIONALITY AND UNITY.

The terms of this inquiry presuppose India as an entity divided—or divisible—into regions

*India a Unitary State contemplating federalism.* ruled by different governments equipped with the same or differing powers. In a word,

they envisage the possibility of a federal India. The Government of India, in contemporary fact, takes the whole area to itself, and acknowledges local autonomy only in the "transferred subjects". That is to say that, in constitutional importance, the Government of India comes first, and India is actually still a unitary state. Moreover, the history of the Government of India follows the course of other governments in this, that the central government came into being in response to the same call which brought about the American Union and the Swiss Confederation. The three Presidencies of Madras, Bombay, and Bengal required, as time went on and problems multiplied, a common head. Hence the creation of the first Governor General in the person of Warren Hastings. To-day the wheel has come full circle and the Presidencies demand a return of some, if not all, of their former powers.

In other countries, too, the Central Government is usually a late-comer in the field of national history, especially in lands with federal constitutions.

*The Federal Government a late-comer in national history.*

This is partly due to the fact that the political education of a people must have advanced many stages beyond the mere alphabet of statecraft before they become aware of problems or ambitions of more than parochial scope. It is only when the gradually rising standard of life has created wants which the small community itself cannot supply that the people of one community form associations with those of the neighbouring communities for the mutual satisfaction of such wants. When these groups of communities, united by common interests but possessing no political unity of a visible kind, have grown to a certain size, in numbers, wealth and territorial extent, then the problems of nationality, statehood, sovereignty, and government arise. It is by the operation of sentiment and economics combined—with the instinct of self-preservation as the final spur—that nations acquire their first sense of nationality, and subsequently experience the need of institutions to embody, protect and sustain it. It is almost certain that

the strength of a common sentiment, even if allied to the enlightened self-interest arising from common economic ends, would never have availed to overcome the conservative inertia and local patriotism of the lesser communities and to compel them to create the greater out of the sacrifice of part of themselves, if fear had not flung its sword into the scales. "Unity is strength" is the lesson taught to every divided people by the enemy at the gate.

Whence, it may be asked, does unity come? And of what is it made? In India, of all lands, this is no superfluous question; for there are to be

*Whence does Unity come?* found in her social fabric elements which have disturbed, if they have not actually destroyed, the unity and the sense of common nationality in other peoples and other times. It is therefore not impertinent, before examining the process whereby national unity has been partitioned by provincial autonomy, to trace the fact of unity and its embodiment in political institutions to its source.

On this question historians and philosophers have wrestled in dispute ever since it first emerged to the light of day after the decay of the Holy Roman Empire and the first awakening of European

nationalism after the Reformation. The Middle

*National Sovereignty a modern conception.* Ages knew neither nation nor state nor sovereignty as we know them. To the citizen

of Frankfort, as to the citizen of Verona, the powers above him were Rome, the Church, and Rome, the Empire. Only after the release of Europe from the all-embracing grasp of the Empire did sovereignty as a *rational* conception appear ; and the course of national development in different parts of Europe led to very different results.

A succession of powerful kings made France one of the most highly centralised unitary states in the world. At a much later date the combined genius of Mazzini, Garibaldi, Cavour, and King Victor Emmanuel, achieved the same result for Italy. Meanwhile in England, from the Wars of

*The Forging of Unity.....* the Roses down to the Battle of Culloden Moor, the same

process was at work, the movement towards unity finding its instruments both in great monarchs and in popular movements. Germany made her way to national unity by slow stages, and even to-day the sense of that unity is not so secure as in some other countries. The protagonists in her progress to a united Germany were her thinkers

and poets who created the ideal with their pens and prepared for Bismarck the field of his greatest triumphs.

The compelling force which proved decisive in all these cases—as in those of America and Switzerland, not to mention others—was the fear of foreign attack. The hostility of Scotland and France made England one: the defence of her .... *on the Anvil of* eastern frontier, as much as *Fear.* her military sovereigns' desire for conquest, united France from Calais to the Pyrenees: fear of invasion from east and west alike drew the German States together: the dread of English power made the thirteen colonies of America come together to form the American Union; and had there been no menacing Austria there would have been no Garibaldi, no Cavour, and Italy would have achieved unity, if ever, in a fashion very different from that which is recounted in the four eloquent volumes of George Macaulay Trevelyan.

Now, if fear of foreign attack forces men to find some enduring habitation for their patriotism in the form of a powerful State, it is not the only promoter of unity. It is only because the

appearance of danger on the horizon brings out what is common to all, namely love of country, that union takes place.

Love of country, or patriotism, is compounded of many things—sentiment, historic associations, community of economic interest, attachment

*Nationality and patriotism.* to the soil itself, trials and triumphs shared in common,—which when welded together make nationality. Love of country is an affection, nationality the intellectual conception in which it is cast by political science. It has been defined many times, but never to the complete satisfaction of those who know what it is and how it can sway the hearts of men and move mountains. A nation has been defined as “a body of people united by a corporate sentiment of peculiar intensity, intimacy and dignity, related to a definite home country”. That is a passable definition in which the essentials are the unity, the corporate sentiment and the definite home country. These factors may be present in a Scotsman for instance, both in relation to his nearer and dearer homeland of Scotland and in relation to the larger *patria* of Britain. Here two patriotisms are happily interwoven in a manner far more complete than that in which a Bengali can

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say that he belongs to the whole of India and the whole of India belongs to him. It is because of the fusion of two patriotisms that Great Britain is truly a United Kingdom : and it is because that fusion is far from perfect in India that Indian nationality is as yet no more than adolescent.

The absence of nationality, or its decay, or even its adolescence, is a condition in which it is not proper nor even possible to create enduring political institutions, whether federal or unitary, if those institutions are to depend for any of their vitality on the popular will. The life is not there, or is but awaking. "Only those" says Mr. Alfred Zimmern, in his "Nationality and Government", "who have seen at close quarters what a moral degradation the loss of nationality involves, or sampled the drab cosmopolitanism of Levantine seaports or American industrial centres, can realise what a vast reservoir of spiritual power is lying ready, in the form of national feeling, to the hands of teachers and statesmen, if only they can learn to direct it to wise and liberal ends."

The influence of language is not to be ignored.

*Language an important factor.*

A common speech is so great a harmoniser that it must be given a place high among the

forces which create national unity. The actual place which language occupies both in the determination of nationality and in the promotion of national unity is a subject on which sociologists and historians have long disputed but the facts are sufficiently clear to leave little room for doubt. There are many lands,—Switzerland, the United States, the Union of South Africa,—in which one political allegiance covers many tongues, and in which therefore the spoken word is not necessarily a guide to the political faith of the speaker. From these instances we may conclude that, while a common language is a powerful agency in the creation of national unity, it is not indispensable to political co-operation. A common language, however, can only be dispensed with where the languages spoken in different parts of any particular country are, each and all of them, adequate vehicles of economic and political thought, not to speak of the higher literary forms necessary in the arts and letters. In this sense a common language is of course, indispensable to India, since none of the indigenous languages has any chance of becoming the *lingua franca* of the whole Indian Empire. Therefore, whatever in future may be the languages of provincial autonomy in India, English



*English the federal language of India.* is and will remain the federal language and as such one of the greatest of all the instruments in the making of Indian unity.

*Local patriotism the foundation of an enduring federalism.* The strongest federal unions are those in which the local patriotism finds a comfortable place within the embrace of the larger national patriotism. In India the larger patriotism is represented not only by India as a whole, but also, though in a still undefined and insecure sense, by India's relation to Great Britain and to the British Empire; and one reason, among many, why Indian politics are so unstable is to be found in the uncertainty and inequality of this relationship. The word "inequality" is used here not in reference to political rights, but to the fact that the magnetism of western influences, of which Great Britain is the agent in India, is so powerful as almost to overbalance the Indian mind. I recently found an extreme case of this in "The Caliphs' Last Heritage" by the late Sir Mark Sykes, M.P., who was once addressed as follows by an individual in Kurdistan :—

"He said he was studying to be an ethnologist, psychologist, hypnotist and poet: he

admired Renan, Kant, Herbert Spencer, Gladstone, Spurgeon, Nietzsche, and Shakespeare. It afterwards appeared that his library consisted of an advertisement of Eno's Fruit Salt, from which he quoted freely. He wept over what he called the 'punishment of our great nation,' and desired to be informed how, in existing circumstances, he could elevate himself to greatness and power".

The moral of this gentleman's derangement needs no pointing ; but its translation into practical politics for India will entail the long pursuit of a deliberate and far-sighted policy both in education and in economics. If Indians, while acquiring English as their political language and adapting British political practice to their own country, allow the roots which attach them to their own local soil to wither, then Federal India will have no more than an empty administrative meaning. Fortunately, the time is long past when the Committee of Public Instruction could say that " the vernacular languages contained neither the literary nor the scientific information necessary for a liberal education," or when an educated Bengali himself could meet an English believer in the

*Significance of the  
revival of Bengali.*

possibilities of the Bengali language with the retort that "anything said or written in the vernacular tongue would be despised in consequence of the medium through which it was conveyed". Through the combined agency of Indian scholars, British missionaries and British administrators, the Bengali language has, in the 80 years since those words were written, been transformed from "a fantastic thing unintelligible, foolish and full of unmeaning, vain pedantry" into a vehicle of thought with "a new status and a classic dignity". It may well be asked how a monograph on provincial autonomy comes to concern itself, even parenthetically, with matters such as these. The justification lies in the spirit behind the institutions. If the revival of Bengali patriotism, under whatever influences, has produced the result described above; and if, in each Indian province in its own appropriate manner, a similar renaissance takes place, accompanied as it must be by a growth in self-respect, then the foundations will have been laid for success in the enterprise of provincial self-government. It is significant and full of hope for the future that, while many individual Indians have allowed

themselves to be uprooted from their native country by the attractions of western life and thought, the renaissance of Indian life, which is so marked a feature to-day, has proceeded parallel to, and contemporary with, the rapid advance of western influence throughout the East. The spirit of that renaissance, when grown to its full stature, will be the life-blood of provincial self-government. It is because this monograph is concerned as much with the spirit as with the letter that this apparently intrusive paragraph finds a place in its pages.

In most federal unions, however, the problem was not the maintenance of a local patriotism against undermining influences, but the education of local patriots in the benefits of union. The reasons why union has so often taken a federal form are plainly written in the geography and the history of the federal countries we are considering.

*The forces which  
give Union a federal  
form.*

The thirteen colonies of the Atlantic Coast of America, for instance, grew up in independence, the one from the others, separated by great distance and peopled by citizens of very different origins. The climate of Boston differed from the climate of Savannah no

more than the Bostonian himself differed from the gentleman of South Carolina; and if the Rhode Islander was a puritan and democratic individualist, the Virginian was a patrician and a cavalier to his very marrow. When some form of union was forced upon the colonies, these differences in habit and outlook made a unitary government impossible and exerted a determining influence upon the character of the federal Constitution. So in Switzerland, each Canton grew in sturdy independence in its home of mountain and valley and, only when compelled by the instinct of self-preservation to join forces with its neighbours, did it yield even the meagre federal rights of the Swiss Constitution to a National Government. It has been held by the apologists of Swiss local autonomy that, after the Reformation, the Swiss Confederation only survived the strife between Catholic and Protestant because its loose bonds lay lightly on both. The Catholic Cantons indeed long withstood the growth of federal power, but eventually, if tardily, in 1874, consented to pay the small price required for the establishment of National Government.

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## CHAPTER III.

## THE EQUILIBRIUM OF A FEDERAL STATE.

Autonomy, in the sense of its original Greek derivation means the condition of an entity which is a law unto itself, or makes its own laws. It may almost be said therefore to describe in classical terms that undefined political or personal ideal

*Meaning of auto-  
nomy.*

which, for India, is expressed in the term 'Swaraj'. There is however no conceivable human circumstance in which the word can be used in an absolute sense to describe actual conditions, for the limitations to which it is subject are obvious. "A State", says my friend Mr. Alfred Zimmern in his *Nationality and Government* (page 56) "can be defined in legal language as a territory over which there is a Government claiming unlimited authority"; but even this apparently Sovereign entity undergoes limitations of all kinds in its intercourse with other States. How much more, then, must a territory which is a part of a greater whole and recognises its obligation thereto, forego all claim to unlimited authority and in return for benefits conferred by a federal partnership with others, accept a more confined scope for its

*Autonomy cannot be absolute.* action? Thus the condition which the word autonomy connotes can only be defined in terms of that which surrounds it. It is therefore appropriate to bring it out of the region of theory into the world of fact.

Autonomy is defined by one authority as "in general, freedom from external restraint, self-government," by another as "a polity in which the citizens of any state manage their own Government". But it is significant that the first authority continues his argument by saying that "the term is usually coupled with a qualifying epithet". The qualifying epithet may be "provincial", "local", "administrative" or "limited"; but whatever it is, it introduces an element which gives the substantive "autonomy" a practical instead of a theoretical significance.

There are here two factors in the equation, each of which acts upon the other; and, unless an equilibrium is established between the forces which they represent, the result is instability. The word equilibrium is perhaps not quite appropriate; for,

*Equilibrium between central power and local liberty.*

by its very latin origin, it suggests an even balance of the scales between the central authority and the subordinate

territories; but, in fact, that balance can never be truly even and must incline towards the central authority in all that is essential to the existence and security of the State. If equilibrium may be taken to mean, not the even balance of the scales, but a state of rest or stability produced by the counteraction of two or more forces, it is appropriate: for, without predicating an equality of power or interest between the two parts of this constitutional equation, it presumes a state of equipoise or contentment which may guarantee the whole system against violent disturbance from within. This apparently abstract disquisition is introduced here as a reminder that, if the health of a federal state rests upon the reasonable satisfaction of the ambitions of each of its members, its very life is at stake in the character and power of the central authority. As the Turkish proverb truly has it, "The fish rots from the head down".

This truth may seem to be so well established as to need neither emphasis nor repetition, but the experience of every nation that has ever engaged its energies in the task of making a constitution for itself on a federal basis shows that the general acceptance of a vital principle is one thing and its expression in the terms of a constitution



quite another. Men will always be found ready to assent to a proposition in the form of an abstract resolution which they will resist in the form of a binding statute. This resistance, offered to an aggrandised central authority, is part of the defence of liberty and has been made the subject of some fine political oratory, which however requires the corrective of a secure knowledge of those accidents which may befall—and have befallen—Federal Constitutions in the making. “The State”, says Mr. Harold Laski in his *Foundations of Sovereignty*, “is an absorptive animal; and there are few more amazing tracts of history than that which records its triumph over the challenge of competing groups”. No doubt! But it has rarely happened that any competing group—be it a social class in Europe or a recalcitrant Colony in the process of becoming a State in America—has failed to exact a penalty of some sort from “the absorptive animal” which impaired its strength. The classic battlefield in this war is the United States of America, and the most heroic figure in it, Alexander Hamilton.

Early in the career of the North American Colonies the need for consultation and united

action was experienced ; and far-sighted men, up and down the eastern coast of America, dreamed of a day when some form of colonial union would embrace the then jarring colonies. James II made an abortive endeavour in that direction when he sought to merge all the colonies

*American progress* north of the Hudson River  
*towards federal* into a single province. Other  
*union.* attempts followed, from time

to time ; and indeed there is hardly a state paper or private letter dealing with colonial affairs, between 1688 and 1789, from documents touching the Leisler insurrection down to Hamilton's letter to James Duane on the Government and the Constitution (1780), which does not reveal the preoccupation of the best minds of America with this problem in federation. Jacob Leisler himself, merciless and turbulent tribune that he was, saw clearer than many of his contemporaries, when, in the ferment aroused in America by the Revolution of 1688, he invited all the northern colonies to come together and make a plan of united action against Canada (1690). Fifty years passed, each bringing its tale of difficulties to increase the gravity of the problem and make a solution imperative, and in

1754, Benjamin Franklin, sometimes called the "most eminent American of them all", actually carried a plan of colonial union in a representative convention at Albany. The plan failed through the opposition of the British Government; but it contained other seeds of failure, inasmuch as, like the Constitution of Poland, it enabled a single recalcitrant member to bring the will of the whole union to nought. "The weak point of the system, says Mr. John Doyle in the "Cambridge Modern History" was that it provided no machinery whereby the Council could exercise any authority over individual citizens, or could even enforce its decision on a refractory province. The scheme was disapproved by many of the colonists as giving too much power to the Crown. It was rejected by the home government as giving too much independence to the colonies."

That weak point was destined to become the pivot of the great constitutional debate which, proceeding thenceforth for forty years with increasing intensity, culminated in the final ratification of the American Constitution, to which Alexander Hamilton contributed more than any other man. From the night on which, as a

stripling of seventeen years, he captured the imagination of New York by his eloquent defence of colonial liberties down to that early morning on the heights of Weehawken, when he lost his life in a duel with Aaron Burr, Alexander Hamilton placed his marvellous talents at the service of the federal ideal, striving ceaselessly to persuade Americans that the one thing needful

*Hamilton and the* was the creation of a great *Federalist*.

Federal Government, equipped with powers which would enable it faithfully and adequately to discharge its duties as the central authority in an American Union. Encountering opposition from the local pride and particularism of individual states, soothing the fears of those who genuinely apprehended the invasion of individual or provincial liberties by a too-powerful central government, writing persuasive letters, by the camp-fires of the War of Independence, to correspondents in all parts of the country, he developed the theme which ten years later found its fullest expression in the classic pages of the *Federalist*—a body of constitutional doctrine, expounded in cogent language, which invites and repays our study to this day.

On the main issues of controversy Hamilton prevailed, and has rightly been called the creator of the Constitution. "Every great undertaking has its master spirit; the master spirit of the Convention which framed the Constitution of the United States and of all that led to it, was Alexander Hamilton . . . . . Hamilton

*Hamilton, the master spirit of the American Constitution.* had already thought out the idea of a Constitution, clear, definite, and strong to withstand domestic feuds and foreign greed. He had thought out, and he laid before the Convention, a form of instrument which he considered better than any likely to be adopted; but if he knew that the mark was too high, it was still to be the mark. A nation was to be created and established, created of jarring commonwealths and established on the highest level of right."

But Hamilton's victory was incomplete. If he had placed beyond serious cavil the chief principles of federation, if he had obtained the adoption of an instrument of Government which gave Federal America security at home and abroad, he had not exercised the spirit of particularism which had been his chief enemy throughout

*His victory incomplete.* Within seven years of his death, Congress undermined his structure at a vital point. It was part of Hamilton's policy, once the victory of the Constitution was won, to buttress the central edifice with allied institutions, financial and commercial, which should ensure stability and continuity in the economic life of the nation. Of these the Bank of the United States of America was the chief.

The First Report on Public Credit (1790) led in the following year to the establishment of the Bank, with a Charter granted by Congress.

*The Illustration of the First and Second United States Banks.* Twenty years later the renewal of the Charter was refused by a Congress in which the enemies of Hamilton's Federalism were strong, and the Bank expired.

It was revived again in 1817, only to expire once more in 1837 at the hands of the same enemies. For this short-sighted act the American people paid a heavy price. During a hundred and one years, the rapid expansion of America provoked conflicts of credit which, in the absence of any controlling authority in the banking world, broke out at times into the fever of financial panic

The insecurity involved in the uncoordinated activities of hundreds of banking institutions, great and small, all over the country proved only too clearly the wisdom of Hamilton's original policy ; but, despite periodical, though not very determined, efforts from time to time, it was not till 1912 that Congress, by creating the Federal Reserve Board, seriously attempted to repair the error of 1811. Even the Federal Reserve Act of the former year was no complete act of penance ; for it paid its tribute to the centrifugal prejudices of America in the creation of no less than twelve Local Federal Reserve Banks. At the same time, the history of the First and Second United States Banks, with its sequel in the Federal Reserve Legislation of 1912, teaches a lesson which is the sufficing justification for recalling the case here ; and the moral of it for India needs no pointing. The Government and the people of India have reason to congratulate themselves that, despite fierce political controversies on other matters, there is practical unanimity in all parties on the value to the State and the people generally of such an institution as the Imperial Bank of India. It is precisely one of those allied institutions which,

though forming no part of the national Constitution, none the less perform a vital function in the life of the State.

If Hamilton's victory was incomplete in the sense shown above, it was also incomplete in another and more vital respect. The writer in the Cambridge Modern History quoted above states that Hamilton knew that the mark which he set for himself and for his fellow-country men

*The original* was too high. Be that as it *cause of the* may, it fell short of perfection *Civil War.* or even of adequacy, in a matter so essential that the nation had to pay the price of it in civil war. The Constitution adopted in 1789 left the residuary powers—and with them a very great measure of sovereignty—in the hands of the States, and the final sovereign authority still in the people as a whole. The Federal Government was assumed, and stated, to have no rights or powers except those explicitly conferred by the Constitution. It thus enjoyed a scope less generous than Hamilton personally had conceived for it. Moreover, the scope of sovereignty and jurisdiction accorded to an individual State was in certain respects undefined. The Constitution left



the question open whether, in founding a Federal Union composed of individual States, those States had or had not pledged themselves to remain for ever within the Union, or whether they still possessed the right to deny the Constitution and secede from the United States. On this matter, Lord Bryce, in his *American Commonwealth*, defends the authors of the Constitution from the charge of lack of foresight in the words :—

“The Constitution was an instrument of compromise and there were questions which it would have been unwise to raise.”

The most critical of all these questions was settled by the Civil War which made the United States “an indestructible Union of indestructible States.” To multitudes of American citizens this conception of their Union as “an instrument of perpetual efficacy” is perhaps the most deeply-rooted article of their political faith and of it Abraham Lincoln is the revered incarnation. None the less, its general acceptance in certain—one may say most—parts of the country is clouded by the grudging acquiescence of other parts. The Southern States, for many years after

the Civil War, and indeed right up to our own time, retained too often their jealous and sullen particularism. It is probably true that, up to the day on which America declared war in 1917, the fissiparous tendency of the South was held in check, less by any true Southern allegiance to the Union than by the proof of the Union's power in the Civil War. It is certainly remarkable that the flag of the Union, *i.e.*, the Stars and Stripes, was never allowed to be hoisted over the Home for Confederate Veterans in Richmond, Virginia, until the American Declaration of War against Germany eight years ago.

Moreover, the history of the Volstead Act, the Federal measure by which the Eighteenth or Prohibition Amendment was made effective, proves that on a given issue a real conflict may arise between a Federal Government and a State and that in the course of the conflict all public respect for law may vanish. Concurrent powers of legislation must have a place in any Federal Constitution but the recent course of liquor prohibition in America reveals some of the risks which concurrency entails.

It may seem at first sight that the conclusions to be drawn from this passage of American

history either do not apply to India or are already woven into her constitutional fabric. There is enough truth in this view to make it

*Indian conclusion* desirable to offer some justification for the form which  
*from American*  
*History.* these introductory paragraphs

have taken. Generally speaking, the Indian Constitution, though unlike the British Constitution in respect of the fact that it rests upon the written Statute, none the less resembles the former in the manner of its growth. It has developed almost accidentally growing now fast, now slow, according to the vicissitudes of recurring critical moments in modern Indian History. Rarely, if ever, has the Government of India or His Majesty's Government envisaged its Indian responsibilities as a constitutional problem requiring a foundation of principle as well as an edifice of carefully designed administrative architecture. The despatches of the Secretary of State and the Governor General in Council which deal with constitutional questions in India, including the Report on Constitutional Reforms by the late Mr. Edwin Montagu and Lord Chelmsford, almost invariably approach the problem from the point of view of a particular—almost momentary—situation in India itself.

Two pre-occupations constantly fill the minds of the two Governments concerned with the administration of the Indian Empire. First and foremost, the Government of India has, at all events until recent times, chiefly concerned itself with administration, and its

*Indian pre-occupations are political and administrative, not constitutional.* pre-occupation with this, the essential executive function of Government, has veiled from its eyes the fact that since the

Crown took over Sovereign responsibility for India in 1858, a constitutional problem of the first magnitude has been slowly incubating and has now reached a stage where a firm grasp of constitutional principle is the only security against costly errors. The second concern of His Majesty's Government and the Government of India alike has ever been the political condition of India. The rise and fall of popular excitement, the dangerous cross-currents of communal feeling and the play of all those other forces that stir the waters of Indian life, constitute the major concerns of the Indian Government. Here and there in official literature there appears the conception of India as a laboratory of political experiment, and here and there the semblance of a genuine con-

stitutional argument; but the library of Indian politics generally is almost barren of treatises or text-books solely devoted to the constitutional development of the powers and responsibility of the Government of India on the one hand and of the Governors in Council on the other. Every official in India knows the difference between the Governor-General and the Governor-General in Council, because the difference has a practical meaning for him in administration; but the discussion of the relation existing between the Secretary of State, the Governor-General in Council and the Governors in Council, as a problem not merely of administrative significance but of far-reaching constitutional importance, has only a theoretical value for him, and therefore the motive for study is lacking. Hence it seems useful, before approaching the facts as they are, to return to first principles and to examine, where possible, their operation in other countries which have concerned themselves with the problem of federation.

If at this point the objection is offered that India is not a Federal State, the answer is that, though government in India does not rest on a

*Paragraph Five of the Preamble: a Finger-Post to Federalism.*

federal basis, the raw material for the creation of a federal constitution already exists, and the first step towards it was taken by Parliament, not perhaps as deliberately or with as full a comprehension as the solemn language suggests, in the fifth paragraph of the Preamble to the Government of India Act, which says :—

“ And whereas concurrently with the gradual development of self-governing institutions in the Provinces of India it is expedient to give to those Provinces in provincial matters the largest measure of independence of the Government of India, which is compatible with the due discharge by the latter of its own responsibilities :”

The next step in the solution of the Indian constitutional problem will bring us face to face with those very questions which the makers of federal constitutions in Germany, in Switzerland, in the British Dominions, and above all in the United States of America, had to answer.

It may also be objected that the emphasis laid here and there in the foregoing paragraphs on the

vital importance of a strong Central Government is unnecessary in India, and that the present situation requires rather the liberation of the Provinces from Central control than the protection of the Central authority from any provincial encroachment. Whatever truth there may be in this objection from the immediate practical point of view of the nine Provinces, it really misses the point which I have endeavoured to establish in the foregoing pages. To state it somewhat differently than hitherto :—

India is fortunate in being able to approach whatever federal problems may lie before her with a Central Government already firmly established, and it is to be hoped that whatever may be done to raise the importance of the provinces and to increase the scope of their autonomous powers, no one in India will forget the good fortune of the country in possessing a Central Government firmly established and well equipped with essential powers. Why? Because in the last resort, due regard being had to liberty, both personal and provincial, the life of the State is preserved by the power at the Centre.

The examination of the relations between the Government of India and the nine Provincial

Governments raises immediately the question of provincial autonomy; and it is the purpose of this monograph to describe existing conditions as laid down in Statute and Rule. Owing to a somewhat careless use of language in controversy the meaning of the phrase provincial autonomy is not always clear. It

*The real meaning of Provincial Autonomy.* is loosely used to describe two separate conditions of provincial government. In current political controversy it wrongly covers *both* the freedom of a Provincial Government from external control by the Government of India *and* the internal political condition of representative and responsible government. The true meaning of the word lies in the former interpretation. It is no doubt correct to use the word "autonomy" in both senses, where there can be no question of the relation of the Province (or State) to any authority superior to it; but a province may enjoy provincial autonomy without what are commonly called free institutions. That is to say, in its true meaning, provincial autonomy tells us nothing of the condition of domestic government prevailing in any particular province or state. In India, provincial autonomy, espe-



cially within the scope of this enquiry, can have no meaning but that which derives from the relation of a Governor's Province to the Government of India and ultimately to the Crown itself, as represented by the Secretary of State and the Imperial Parliament.

The greatest of all restrictions upon provincial autonomy is the responsibility of the Secretary of State as the agent of the Sovereign authority of Parliament for everything that pertains to the government, either of India as a whole or of any Province. To trace the ramifications of this restriction would entail a pro-

*The greatest restriction on provincial autonomy is the sovereignty of Parliament.*

longed study of the despatches of the Secretary of State dealing with those major Indian questions, either Imperial or Provincial, in which the Secretary of State has from time to time exercised the right of superintendence, direction and control. These despatches do not form part of the material entrusted to me for the purpose of this enquiry, nor would it be possible to deal adequately with them within the short compass of a monograph of this character. Moreover it will probably be found that in many cases it was not the direct

action, by despatch or otherwise, of the Secretary of State which hampered the action of any Provincial Government at any particular moment, but the knowledge that the Secretary of State possessed the right and power to do so. A further field of enquiry of much the same kind lies in the correspondence between the Government of India and the Provincial Governments on similar matters.

Now Parliament in passing the Government of India Act realised that the pledge of August 1917 could not be fulfilled in respect of the Indian

*Relaxation of control of Secretary of State.* Provinces without some relaxation of this control. Therefore

under section Nineteen A, the Secretary of State is authorised to restrict by rule the exercise of his own powers of superintendence, direction and control, and did in fact make a rule dated the 14th December 1920, by which these powers were to be exercised only for the following purposes :—

- (1) to safeguard the administration of central subjects ;
- (2) to decide questions arising between two provinces, in cases where the provinces concerned fail to arrive at an agreement ;

- (3) to safeguard Imperial interests ;
- (4) to determine the position of the Government of India in respect of questions arising between India and other parts of the British Empire ; and
- (5) to safeguard the due exercise and performance of any powers and duties possessed by or imposed on the Secretary of State or the Secretary of State in Council, under or in connection with or for the purposes of the following provisions of the Act, namely section 29A, section 30 (1A), Part VII A, or of any rules made by or with the sanction of the Secretary of State in Council.

The five clauses of this rule define the scope which a Central Government, under a federal constitution of any kind, would necessarily claim as its own for the due exercise of this responsibility. Indeed a Central Government could not well rest content with less, while it might easily claim more. It is true that the Central Government need not always itself exercise the powers in question. For instance, the greater part of the jurisdiction contained in clause 2 above, belongs in America not to the Federal Government, but to the Supreme

Court of the United States, which is of course a federal institution. As a measure of provincial autonomy this relaxation rule must be regarded in the light of the already limited autonomy which the Governor in Council or the Governor acting with Ministers or the Legislative Council of a Governor's province actually enjoy in respect of subjects—reserved and even transferred—confided to them. This part of the matter is reviewed in chapter VII.

The purpose of the Government of India in requiring the preparation of this monograph, I understand, is to make available as much as possible of the material at present lacking for the examination of the constitutional position in India by the Government itself, by the people as a whole, and eventually by the Statutory Commission. The scope of the present argument is no more than an introduction to the study of the relations between the Government of India and the local Governments, wherein actual contemporary Indian facts are stated, and an attempt is made to describe the different ways in which other countries have sought or reached a solution of the problems involved.

## CHAPTER IV.

## SEVEN REPRESENTATIVE FEDERAL CONSTITUTIONS.

Federal Constitutions vary in character and display in their variety the results of the struggle between centripetal and centrifugal forces. Where the desire for union is strong enough to overcome the reluctance of each individual part to merge itself in a complete unity, there the Constitution, as in South Africa, exalts the central power and severely limits provincial autonomy ; where that desire is not strong enough to do so, the Constitution, as in the United States of America, explicitly assigns to the central authority only those powers and duties, administrative, legislative and judicial, " which " in Lord Bryce's words, " must be deemed common to the whole nation, either because all the parts of the nation are alike interested in them, or because it is only by the nation as a whole that they can be satisfactorily undertaken." The whole residue of sovereignty, which in South Africa belongs to the Union, belongs in America either to the states individually, or to the people as a whole. The Canadian Constitution presents, generally speak-

ing, the centripetal character, while the Australian follows more nearly the American model. Switzerland again is *par excellence* the land of provincial autonomy : and, while Imperial Germany was, in its time, such a hybrid as almost to require a special definition of federalism for itself, Republican Germany has given herself something like the centralised government which Bismarck coveted.

As a rule the Constitution of a Federal State recites in an early section the powers, legislative, or other, which belong to the Central Government, and thus *ab initio* reveals the balance of power within the state. The recital varies in form as much as in substance, as the following quotations from seven representative Federal Constitutions will show :—

Section I of Article 1 of the Constitution of the  
*United States of* United States of America,  
*America.* adopted in 1787, though not  
 completely ratified till 1789,  
 declares that :

“ All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”

The words " herein granted " reveal the fact that the Federal Legislature (Congress) is not the sovereign power but shares much of its sovereignty with the States and the people as a whole, and in fact derives its powers solely from the people.

The Commonwealth of Australia Constitution Act, 1900, declares in section 9, Chapter I, Part I, sub-section (i) that :

" the legislative power of the Commonwealth shall be vested in a Federal Parliament  
..... "

but this power is defined by the provisions of Chapter I, Part V, which limits the scope of the Federal Parliament to 39 subjects, with the addition of such matters as the site of the Federal Capital. Moreover, Chapter V, sub-sections 106 and 107, defines still further this limitation in the following words :

" 106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered

in accordance with the Constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at admission or establishment of the State, as the case may be."

The effect of these provisions is to leave the residue of power—as far as it does not still rest in the Crown and the Imperial Parliament—in the hands of the States composing the Australian Commonwealth. The Australian Constitution therefore partakes of the same character as the Constitution of the United States, and it is significant that the High Court of Australia (the Federal Supreme Court) has shown a marked tendency to seek precedents and analogies for the constitutional cases brought before it, in the judgments of the Supreme Court of the United States of America more than in any other source.



The British North America Act, 1867, section 9, vests the executive Government of Canada in the Queen and, section 17 declares that "there shall be One Parliament for Canada ....". Section 91 moreover runs as follows :—

"It shall be lawful for the Queen, by and with the advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, *but not so as to restrict the Generality of the foregoing terms of this Section*, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated."

The important words here are "but not so as to restrict the Generality, etc.," which are the constitutional antithesis of the words "herein granted" in the American Constitution, and show

that all residuary powers are in the Canadian Parliament and not in the provinces.

The Preamble to the South Africa Act, 1909, says "whereas it is desirable . . . . . that the

*South Africa.* several British Colonies . . . . .

be united under one Government in a Legislative Union . . . . ." and the Act itself section 8, vests "the executive Government in the King," and, section 19, "the legislative power of the Union in the Parliament of the Union." Section 59 gives the Parliament of the Union full power "to make *Laws* for the peace, order, and good Government of the Union." Section 85 empowers the *Provincial Councils* to make *Ordinances* in relation to 13 classes of subjects. The provisions of these two sections with their deliberate distinction between *Laws* and *Ordinances* place the South African Constitution on a more highly centralised foundation than any other British Dominion.

The Constitution of the Swiss Confederation (Constitution Fédérale de la Confederation Suisse,

*Switzerland.* 1874) declares in its First Article that :

"The peoples of the 22 Sovereign Cantons of Switzerland united in the present

allance, namely : Zurich, Berne, Lucerne, Uri, Schwyz, Unterwalden (Le Haut et le Bas), Glaris, Zoug, Fribourg, Soleure, Bale (ville et Campagne), Schaffhouse, Appenzell (les deux Rhodes), St. Gall, Grisons, Argovie, Thurgovie, Tessin, Vaud, Valais, Neuchatel et Gereva, compose together the Federati<sup>o</sup>n."

The Third Article further declares that :

"The Cantons are Sovereign in so far as their sovereignty is not limited by the Federal Constitution, and, as such they exercise all the rights not explicitly delegated to the Federal Power."

Switzerland is thus the all—but complete anti-thesis to South Africa.

The Constitution of the German Empire (1871) describes the Empire as a Confederation: but it — *Imperial Ger-* was in fact a military a<sup>l</sup>liance *many.* dominated by one of its parts (Prussia) and, though enclosed in a political framework of Federalism, departing in many respects from the type of government usually recognised as federal. It finds a place in this record because it offers one or two interesting features in

the relations between the Federal Government and the States. The Empire had large legislative powers but small means to execute them ; and it has been accurately described as a picture of "legislative centralisation and executive decentralisation," except for the Army.

The Constitution of Republican Germany (1919) starts from the same source, but goes so much further in the direction of centralisation that, though *Republican Germany* many. federal in form, it is unitary in substance. The German States are now shorn of most of their former powers and privileges. Sovereignty vests in the people, whereas the Imperial Constitution of 1871 was adopted by the five Crowned Heads of Prussia, Bavaria, Wurttemberg, Baden and Hesse, who claimed, and exercised, each his own sovereignty.

It is perhaps worth observing here that the greater importance of the units which compose the American and Australian Federations is indicated by the fact that they are called *States*, while the subordinate character of the Canadian and (to a much greater degree) the South African units is seen in their description as *Provinces*. Moreover the German units, hitherto called *States*

are now known as Länder, the Lands or Territories of the German Commonwealth.

The foregoing paragraphs give in bare outline and an easily comparable form the essential points of difference and resemblance between these seven Constitutions. The pages which now follow describe in greater detail the provisions of some of them and the manner in which they have worked in practice.

#### UNITED STATES OF AMERICA.

It was no accident that gave American experience special prominence in the paragraphs of the first chapter: for the circumstances of America in the Eighteenth Century, and the fact that a Federal Constitution has been in operation there for a hundred and thirty-eight years since, make the practice of Federal America peculiarly instructive.

Sovereignty in America resides in the people as a whole and all the instruments of American

*Sovereignty in government are in the last resort United States of made by the people. Recently, America.*

moreover, the tendency has been to emphasise the popular origin of sovereignty, as for instance in the substitution of popular for an

indirect election by the State Legislatures in the case of Senators to serve in Congress, and in the practical elimination of the Electoral College in the election of the President. Lest there should be any doubt regarding the character of the Federal Government and of Congress in respect of this vital matter, the following Tenth Amendment was proposed and ratified almost before the ink was dry on the original Constitution :—

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

The most authoritative comment, or rider, on this Amendment is to be found in the judgment handed down by Chief Justice Marshall (*M'Culloch v. Maryland*, 4 Wheat., 404), in which he describes the conventions which framed and adapted the Constitution as instruments of the popular will. When “the instrument (*i.e.*, the Constitution) was submitted to the people,” says the most famous of all the Chief Justices of the United States, “they acted upon it, in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. It is true they assembled in their several

States, and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separated the States, and of compounding the American people into one common mass. Of consequence, when they act they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves or become the measures of the State government. From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is ordained and established in the name of the people....  
..... ;”

The source and present residence of American sovereignty are—in theory at least—clear. We shall observe presently that the Constitution in one or two respects left the matter indeterminate enough to enable the Supreme Court by the fertile invention of the doctrine of implied powers to sustain the limited sovereignty of the United States as a whole against more than one attempt by individual States to encroach upon it.

Article 2, section 1, of the Constitution defines the primary duty of the Federal Government by

*The powers and duties of the Federal Government.*

reciting the oath which the President takes before entering on the execution of his office :—

“ I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability preserve, protect, and defend the Constitution of the United States.”

The President is the supreme Federal executive authority, and derives his power direct from the sovereign people. The exercise of his power, though wide, is limited by the Constitution, and the oath which he takes on assuming office must be regarded as a pledge, repeated every four years, that the chief magistrate of the United States will scrupulously regard the rights of the individual States and acknowledge the sovereignty of the people. The framers of the Constitution constantly found themselves in a dilemma, always the same in substance though varying in form. While they were determined to create a National government strong enough to defend the country from external attack or internal disruption, they shrank from endowing it with powers which might tempt it to usurp the



functions of the States or to override the popular will in a manner which they were wont to attribute to the Crowned Heads of Europe. And it is certain that, in prescribing an oath of fidelity to the Constitution to be taken by the President, they had in mind the protection of "States' rights" as much as anything else.

Article 4, section 4, imposes a further obligation in relation to the States :—

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion ; and on application of the legislature, or of the executive (when the legislature can not be convened), against domestic violence."

The Federal Government of the United States, of which the President is the chief executive officer, receives from the Constitution only that irreducible minimum of function absolutely needed for the national welfare. At the same time, the framers of the Constitution deliberately placed it in *direct* contact with all the citizens in respect of those functions, so that its action

*The Powers of the Federal Executive.*

might be free from all friction or hindrance due to the interposition of State officials as the (possibly unwilling) agents of the Federal Government. Thus the normal course of federal administration runs on a different plane from that of the States. It is only where the normal course is disturbed that the Federal Government may encroach upon the otherwise protected autonomy of the States. The President can only interfere with a State when it is his duty either to give effect to federal law or to exercise those discretionary executive functions which constitutionally belong to him (Articles II and IV of the Constitution).

It is the President's duty to maintain the republican form of government, and if any State

*Cases of Federal action against a State.* were to attempt to overthrow it, he is constitutionally bound to restore it. Equally if a

State were to attempt to resist the legitimate action of federal officers in the course of their duty, the President must sustain his agents, if necessary by force of arms. Moreover, constitutionally speaking and apart from the question of negro slavery, the Civil War was the classic occasion of the use of the armed force of the Union to suppress an insurrection against the autho-

city of the Federal Government. We may observe here that neither the secession of the eleven Southern States in 1861, nor their absence from Congress from 1861 to 1865, nor their inability to take part in the Presidential election of 1864, did anything to diminish the full legal powers of the Federal Government and of Congress—the contrary opinion of the Southern States and of some European Governments notwithstanding.

The President has also the constitutional obligation to employ the Federal army, or to require the assistance of the militia of another State on the request of any State, by the resolution of the State legislature or appeal from the State executive, in suppressing “domestic violence.” In 1794 George Washington, as President, employed

*Cases of Federal  
action in co-operation  
with a State.*

the combined militia of Pennsylvania, New Jersey, Virginia and Maryland to quell the Pennsylvania Whisky Rebellion; and Lord Bryce remarks that “this, the first assertion by arms of the supreme authority of the Union produced an enormous effect on opinion.” In 1842, President Tyler called out the militia of Massachusetts and Connecticut as a precautionary measure during the Rhode Island

rebellion led by Dorr : in 1877 President Hayes restored order in Pennsylvania by the use of federal troops ; while in recent years, there have been numerous cases of similar Federal action in West Virginia and in Colorado where armed force from without was employed to sustain the authority of those States during coalmining disputes.

The National Government is in the last resort the power that defends and preserves the Union.

*The Federal Government the final bulwark of the Union,* Mr. Richard M. Venable of Baltimore, in an essay entitled " The Partition of Powers between the Federal and State Governments," says : " It can exercise all powers essential to preserve and protect its own existence and that of the States, and the constitutional relation of the States to itself and to one another. "

If this is so, and there is no reason to doubt the essential truth of Mr. Venable's statement, the question may well be asked : *Quis custodiet ipsos custodes ?* If, for instance, the Federal Government, controlling the Army and the Post Office, chose to abuse the powers which it possesses at the expense of a State or a group of States, might it not even go so far as to destroy the federal basis of the United

States and transform itself into a unitary government? Constitutionally and practically, there is no tangible barrier to arrest the progress of a President who set out upon this course. The Supreme Court of the United States and the other Federal Courts were set up to check the usurpation of powers by the executive, but the Federal judiciary has naught but moral force at its command.

This result of the American distribution of powers is possible, but not probable. It is not in the last resort the Federal Government or the States or the Supreme Court which sustains the Constitution of the United States of America. It is the overwhelming force of a loyal public opinion. If public opinion should veer towards the strengthening of the Federal executive or towards the substitution of a unitary for a federal State, the Constitution would die in a night. Moreover, unless resisted by a powerful minority, the revolution from federalism to complete unity would be bloodless. The legal form for it is already provided by the manner in which the Constitution may be amended; and only if the minority were numerous enough to prevent the

*but public opinion  
is the main-stay of  
the Federal Consti-  
tution.*

passage of any such amendment and it moreover the desire of the majority were sufficiently vehement, could the change only be effected by force. "But in either event, and both are improbable", says Lord Bryce, "the change which will have passed upon the sentiments of the American people will be a sign that federalism has done its work and that the time has arrived for new forms of political life". It will be seen that this most experienced observer of American affairs is confident that America is secure from this kind of disruption: but the warning, however theoretical or unneeded it may be for the United States of America, is not by any means empty for India since it points to a contingency and a danger against which an instructed, united and alert public opinion is the only safeguard. The essence of the warning is that, whether the danger to the Constitution threatens from the perimeter or from the centre of any political community, the only lasting bulwark against the tides of disruption is a virile and homogeneous public opinion. Where public opinion is but little instructed, is not alert, and least of all united, the warning becomes urgent. In such a case the means to preserve national unity must be tangible and adequate.

The Federal Legislature of the United States, composed of the Senate and the House of Repre-

*The Federal principle in the composition of Congress.* sentatives, was designed by the men of 1787 to represent American interests in two different ways. The House

of Representatives is elected to represent the nation on a purely numerical basis ; the Senate till recent years was elected by the Legislatures of the individual States to represent the interests of the States. Each State returned two Senators to serve in Congress ; and therefore, while the State of New York outnumbered the State of Wyoming by 5 to 1 in the numerical representation of the House of Representatives, their strength in the United States Senate was and is equal. The Senate is therefore the true federal House representing in its origin the victory of the upholders of States Rights and now, for various reasons, actually wielding vastly greater power over public affairs in the United States than the House of Representatives. This is due to a variety of causes. It wields greater power because it actually possesses greater powers, *e.g.*, it shares with the President of the United States the treaty-making power, it possesses the right to endorse his executive ap-

pointments, it is longer-lived than the House of Representatives and possesses a continuity of existence denied to the more popular body. We may remark in passing that, by the almost universal testimony of observers, since the States resolved to elect their Senators not by indirect choice in the State Legislature but by direct election among the people at large, the character of the Senate has declined and the individual Senator, though usually older and more experienced, has tended to approximate more in type to the individual Representative. The moral will not be lost upon those who in the design of their Second Chamber may seek to provide an arena of elder statesmen. It is common knowledge that many an elder statesman has failed to pass the arbitrary test of the platform and the polls.

State law, not Federal law, governs the franchise of the United States. The State Legislature selects the qualifications of electors both for its own elections and for those of the House of Representatives, and now also for the Senate. The latitude left to the States in this matter is wide. A State may

*The Federal principle not acknowledged in the electoral franchise.*



appoint its Presidential electors for the Electoral College, in any manner it pleases, though in point of fact they are now all selected by popular election. And in the case of the general franchise there are many remarkable anomalies and curiosities. Thus, until the passage of the Nineteenth, or Woman Suffrage, Amendment in 1920, the vote of a State practising woman suffrage might turn a Presidential election in spite of the fact that no other State in the Union had admitted women to the poll. Moreover, more remarkable still, the vote of those States which had admitted aliens (namely persons not citizens of the United States) to the vote might again prove the turning point in a closely contested Presidential election. This result has never emerged; but the possibility of it is a loophole so wide as to constitute a veritable breach in constitutional security.

*Scope of Federal legislation, Article 1, section 8.*      Article 1, section 8, defines the scope of Federal legislation :—

“Section 8.—The Congress shall have power—

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all

duties, imposts, and excises shall be uniform throughout the United States ;

To borrow money on the credit of the United States ;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes ;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States ;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures ;

To provide for the punishment of counterfeiting the securities and current coin of the United States ;

To establish post-offices and post-roads ;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries ;

- To constitute tribunals inferior to the Supreme Court ;
- To define and punish piracies and felonies committed on the high seas and offences against the law of nations ;
- To declare war, grant letters of marque and reprisal and make rules concerning captures on land and water ;
- To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years ;
- To provide and maintain a navy ;
- To make rules for the government and regulation of the land and naval forces ;
- To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions ;
- To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the

authority of training the militia according to the discipline prescribed by Congress ;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful building ; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Read with the Tenth Amendment (see page 18), this section explicitly circumscribes the liberty of the Federal Government and of Congress. The Constitution deliberately leaves the remaining functions and subjects, without defining

*The Residue of Sovereignty left in the States and in the People.* them, to the States and to the People as a whole, with but one set of limitations which are to be found in the prohibitions of sections 9 and 10—

“ *Section 9.*—The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation, or other direct tax, shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another ; nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury, but in consequence of appropriations made by law ; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States ; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

" *Section 10.*—No State shall enter into any treaty, alliance, or confederation ; grant letters of marque and reprisal ; coin money ; remit bills of credit ; make anything but gold and silver coin a tender in payment of debts ; pass any

bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws ; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States ; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

This division of functions leaves such vital functions of government as law and order, civil law, criminal law, local government, educa-

*The powers of the individual States.*

tion, public health, the raising of the militia, and the general police power, in the hands of each individual State. "The powers vested in each State", says Lord Bryce, "are all of them original and inherent powers, which belonged to the State before it entered the Union. Hence they are *prima facie* unlimited, and if a question arises as to any particular power, it is presumed to be enjoyed by the State, unless it can be shown to have been taken away by the Federal Constitution; or, in other words, a State is not deemed to be subject to any restriction which the Constitution has not distinctly imposed. The powers granted to the National government are delegated powers. enumerated in and defined by the instrument which has created the Union. Hence the rule that when a question arises whether the National government possesses a particular power, proof must be given that the power was positively granted. If not granted, it is not possessed, because the Union is an artificial creation, whose government can have nothing but what the people have by the Constitution conferred. The presumption is therefore against the national government in such a case, just as it is for the State in a like case."



To illustrate the bearing of the last sentence in the foregoing paragraph *A practical illustration from Lord Bryce* quotes a case *Detroit.* where a person living in Detroit, Michigan, was prosecuted for selling oil for lighting purposes at a lower flash point than that permitted in a certain Federal statute. Being an offence against a Federal statute, the case was tried in a Federal district court in that city, and the prisoner was convicted. An appeal was taken to the Supreme Court of the United States, which (*United States v. Dewett*, 9, Wall. 41) held that, since the Federal statute invaded the police power of the States in a manner not explicitly authorised by the Constitution, the statute itself was invalid, except in the District of Columbia and the Territories. The person convicted in Detroit was therefore discharged.

On the other hand, the authority of the National government, in all federal matters, over the citizens of every State is direct and immediate, “not exerted through the State organisation, and not requiring the co-operation of the State government. For most purposes the National government ignores the States ; and

*Federal authority exercised directly.*

it treats the citizens of different States as being simply its own citizens equally bound by its laws. The Federal courts, revenue officers, and post-office draw no help from any State officials, but depend directly on Washington. Hence, too, of course, there is no local self-government in Federal matters. No Federal official is elected by the people of any local area. Local government is purely a state affair."

"In determining the powers of Congress on the one hand and of a State government on the other, *How the line is drawn between Federal and State jurisdictions.* opposite methods have to be followed. The presumption is always in favour of the State; and in order to show that it cannot legislate on a subject, there must be pointed out within the four corners of the Constitution some express prohibition of the right which it *prima facie* possesses, or some implied prohibition arising from the fact that legislation by it would conflict with legitimate federal authority. On the other hand, the presumption is always against Congress, and to show that it can legislate, some positive grant of power to Congress in the Constitution must be pointed out. When the grant is shown, then

the Act of Congress has, so long as it remains on the statute book, all the force of the Constitution itself. In some instances the grant of power to Congress to legislate is auxiliary to a prohibition imposed on the States. This is notably the case as regards the amendments to the Constitution, passed for the protection of the lately liberated negroes. They interdict the States from either recognizing slavery, or discriminating in any way against any class of citizens ; they go even beyond citizens in their care, and declare that "no State shall deny to any person within its jurisdiction the equal protection of the laws." Now, by each of these amendments, Congress is also empowered, which practically means enjoined, to 'enforce by appropriate legislation' the prohibitions laid upon the States. Congress has done so, but some of its efforts have been held to go beyond the directions of the amendments, and to be therefore void. The grant of power has not covered them."

The individual State in its turn stands on its own feet, and, except in extremity, relies upon the National government for nothing. "It is the creation of its own inhabitants. They have given it its constitution. They administer its

government. It goes on its own way, touching the National government at but few points. That the two should touch at the fewest possible points was the intent of those who framed the Federal Constitution, for they saw that the less contact, the less danger of collision. Their aim was to keep the two mechanisms as distinct and independent of each other as was compatible with the still higher need of subordinating for national purposes, the State to the Central government."

The subjects on which Congress and the State Legislatures possess concurrent power in legislation make some of the few points of contact between the two authorities. If Congress, acting within its constitutional powers, passes an Act which conflicts with an existing State statute, the latter gives way and the Federal Act becomes the only law. The power of Congress to pass laws of this kind is not exclusive of the power of States to pass them also : and, whereas Federal here supersedes State law, the operation of a State law is only suspended by the enactment of a Federal law, and, if and when the Federal statute is repealed, the State law becomes valid once more and requires no re-enactment.

The Federal Government and the States possess  
*Subjects of con-* concurrent powers to legislate  
*current legislation.* upon :

- (1) Bankruptcy ;
- (2) The times, places, and manner of holding elections for members of Congress, *i.e.*, Senates and Representatives ; but not the electoral qualifications of the electors themselves ;
- (3) Pilotage and Ports ;
- (4) Taxation, “ but so that neither Congress nor a State shall tax exports from any State, and so that neither any State shall, except with the consent of Congress, tax any corporation or other agency created for Federal purposes or any act done under Federal authority, nor the National Government tax any State or its agency or property.”
- (5) Judicial powers, *e.g.*, where a case may be taken either in a Federal or in a State court.

*N. B.*—In all cases of (1), (2) and (3) above, State law gives way to Federal law, or operates only in the absence of it.

The actual working of the system of concurrency described in the two foregoing paragraphs can be shown briefly in the case of the power of the United States Congress "to establish.....uniform laws on the subject of bankruptcy throughout the United States." Congress exercised this power and passed uniform Bankruptcy Acts for the whole Union which automatically superseded any existing State statute on the subject. At a later date these laws were repealed and the local legislation returned to life again, though not without a crop of cases in which the Supreme Court had to interpret the meaning of the Constitution for American banks and bankrupts (see *Sturges v. Crowninshield*, 4 Wheat. 122, 196; and *Butler v. Gorely*, 146 U. S. 303, etc.).

The limitation of a State's power of taxation in respect of Federal agencies [see (4) above] is the result, not of any explicit provision in the Constitution, but of the judgment handed down by Chief Justice Marshall in the case of *M'Culloch v. the*

*Limitations on the power of an individual State to encroach on the Federal domain: the doctrine of "implied powers".*

State of Maryland (4 Wheat. 316) wherein the doctrine of "implied powers" was propounded. Congress in 1791, as we have seen (page 10), established the Bank of the United States, in the face of violent opposition from certain sections of the States. Under its charter, the Bank was entitled to operate throughout the Union by means of branches; and it had opened a branch in Maryland. The Maryland legislature, acting on the assumption, or what one American authority has called the "pretence" of co-ordinate sovereignty, passed an act imposing a tax on the circulation of all Banks operating within the State of Maryland and chartered otherwise than by the authority of the State. The Bank of the United States resisted the demand of the State of Maryland for payment of the tax and the subsequent imposition of the penalty for non-payment. The state thereupon sued the Bank to recover in debt the tax and the penalty. The Maryland courts upheld the law and ordered the Bank to pay; whereupon the Bank appealed to the Supreme Court of the United States.

The facts of the case were not in doubt. Maryland had deliberately carried the losing battle of States rights from Congress, which has

granted the Banks' charter, to its own legislature where it saw an opportunity to hamper, if not hamstring, the Federal authority. The tax imposed was so heavy as obviously to be designed to force the Bank to close its doors, and thus indirectly to show that any individual State could defeat the will of Congress by a local enactment. The pivot of the case was the original charter of the Bank. Did Congress or did Congress not exceed its constitutional powers in granting the charter? Chief Justice Marshall, supported by the unanimous opinion of the Supreme Court, held that the Charter was within the constitutional powers of Congress. In an argument which has become one of the leading cases in American constitutional law, he declared that since Congress has the power to lay and collect taxes, etc., etc., to borrow money on the credit of the United States, to pay the debts of and to provide for . . . . . the general welfare of the United States; to regulate commerce . . . . . among the several States"; and moreover since Congress is further empowered "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," it could obviously in the exercise of these powers establish



a fiscal system and select its own agencies to operate it. Now a Bank is a proper agency to carry out the powers of a Government in its fiscal policy, and, since it is a means appropriate and plainly adapted to, and not inconsistent with, the letter and the spirit of the Constitution, Congress was within its constitutional discretion in chartering the United States Bank. Herein was the first proclamation of the doctrine of implied powers, which has had a profound influence upon constitutional development in America. Chief Justice Marshall's judgment had an immediate effect upon American public opinion. Handed down at a time when the authority of the Federal Government was by no means secure, it greatly strengthened the hands of the Federalists and provided a remarkable object-lesson in the doctrines which Hamilton and his coadjutors had propounded. Indeed, one modern student of the Constitution says:—"This decision more effectually than any other single decision established the Federal Government, put an end to the State Rights opinions, then too prevalent, that the States could thwart and cripple, under pretence of co-ordinate sovereignty, the sovereign power of the United States."

The foregoing paragraphs do not pretend to exhaust the subject, but they present, in sufficient

*The Dilemma of the Private Citizen.* detail for the present purpose, the picture of the American Constitution in operation on its legislative side, with some powers, exclusively allotted to Congress, with others (a very large part of the whole) belonging by the implication of residuary sovereignty to the States, and with still a third part of legislative jurisdiction shared by both. Before we pass to the relations of the two executive governments—Federal and State—we may pause for a moment to consider the dilemma which here not seldom confronts the private citizen. The individual citizen of the State of Rhode Island, a state which has more than once carried particularism and individualism *a outrance* and whose inhabitants have at times earned a stiff-necked name for themselves,\* is also a citizen of the United States.

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\* This singular little commonwealth, whose area is 1,085 square miles (less than that of Ayrshire or Antrim), is of all the American States that which has furnished the most abundant analogies to the republics of antiquity, and which best deserves to have its annals treated of by a philosophic historian. The example of her disorders did much to bring the other States to adopt that Federal Constitution which she was herself the last to accept.

Providence\* and Washington† alike have the right to command their obedience ; but where these two authorities disagree who is to compose the difference and to point the citizen to the path of correct conduct ? The Supreme Court, in the last resort, will do all these things, but long before the Supreme Court has laid down the frontier between conflicting allegiances, the citizen himself will have to find his own rule of conduct. And if the citizen should happen to hold public office, he may find that his dilemma leads him to the courts of justice and even, in extreme cases, to gaol.

Among many cases which appear in the judicial records of America to illustrate this dilemma, Lord Eryce relates one which I give here. *Illustration : The Ordinance of San Francisco (1876) and the Chinaman's pigtail.* The city of San Francisco, acting under a Californian Statute, passed, in 1876 "an ordinance directing that every male imprisoned in the county gaol should 'immediately on his arrival have his hair clipped to a uniform length of one inch from the scalp.'

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\* The reference here is to the capital of Rhode Island, of course !

† Washington here is the city, not the man.

The sheriff, having, under this ordinance, cut off the queue of a Chinese prisoner, Ho' Ahkow, was sued for damages by the prisoner, and the court, holding that the ordinance had been passed with a special view to the injury of the Chinese, who consider the preservation of their queue a matter of religion as well as of honour, and that it operated unequally and oppressively upon them, in contravention of the fourteenth amendment to the Constitution of the United States, declared the ordinance invalid, and gave judgment against the sheriff."

"The safe rule for the private citizen may be thus expressed: 'Ascertain whether the Federal

*The Safe Rule*  
*for the Private Citizen.* law is constitutional (i.e., such as Congress has power to pass). If it is, conform your conduct

to it at all hazards. If it is not, disregard it, and obey the law of your State.' This may seem hard on the private citizen. How shall he settle for himself such a delicate point of law as whether Congress had power to pass a particular statute, seeing that the question may be doubtful and not have come before the courts? But in practice little inconvenience arises, for Congress and the State legislatures have learnt to keep within their

respective spheres, and the questions that arise between them are seldom such as need disturb an ordinary man."

"The same remarks apply to conflicts between the commands of executive officers of the National

*Conflicts between* government on the one hand,  
*Executive Officers.* and those of State officials on the other. If the national officer is acting within his constitutional powers, he is entitled to be obeyed in preference to a State official, and conversely, if the State official is within his powers, and the national officer acting in excess of those which the Federal Constitution confers, the State official is to be obeyed."

"The limits of judicial power are more difficult of definition. Every citizen can sue and be sued

*The Jurisdiction* or indicted both in the courts  
*of Federal and State* of his State and in the Federal  
*Courts of Law.* courts, but in some classes of

cases the former, in others the latter, is the proper tribunal, while in many it is left to the choice of the parties before which tribunal they will proceed. Sometimes a plaintiff who has brought his action in a State court finds when the case has gone a certain length that a point of Federal

law turns up which entitles either himself or the defendant to transfer it to a Federal court, or to appeal to such a court should the decision have gone against the applicability of the Federal law. Suits are thus constantly transferred from State courts to Federal courts, but no one can ever reverse the process and carry a suit from a Federal court to a State court. Within its proper sphere of pure State law,—and of course the great bulk of the cases turn on pure State law,—there is no appeal from a State court to a Federal court; and though the point of law on which the case turns may be one which has arisen and been decided in the Supreme court of the Union, a State judge, in a State case, is not bound to regard that decision. It has only a moral weight, such as might be given to the decision of an English court, and where the question is one of State law, whether common law or statute law, in which State courts have decided one way and a Federal court the other way, the State judge ought to follow his own courts. So far does this go, that a Federal court, in administering State law, ought to reverse its own previous decision rather than depart from the view which the highest State court has taken. All this seems extremely complex. I can only say that it is

less troublesome in practice than could have been expected, because American lawyers are accustomed to the intricacies of their system."

Now, above and beyond the constitutional bearing of these considerations, whether legislative, executive or judicial, there is a moral question arising from the esteem or disesteem in which the citizen holds the legislative authority. *State Legislatures lose public respect.* Respect for law is natural to a law-abiding people which the Americans are, on the whole, but it does not and will not survive either repeated conflicts between the lawmaking bodies, acting with concurrent <sup>not to</sup> powers, or still less an excess of social legislation. The makers of the American Constitution, foreseeing the weakening effect of conflict on both sides, deliberately laid out their respective fields of operation as well separated as possible; but in leaving the large residue of sovereignty to the individual States they gave the State legislatures so wide a scope that its very largeness has proved a temptation which some of them have not resisted. It has been said of the United States that, while the citizens of the individual States are tenacious of their State's Rights, they are contemptuous of

those whom they elect to exercise them. Conversely, they hold the Congress of the United States in higher esteem. I remember well the illuminating remark of a young politician in the State of Oregon, whose contempt for "Prohibition" as a *State* enactment was practically displayed in his possession of a private still. "I've never heeded," said he, "the prohibition of liquor by State law: but when Uncle Sam (meaning the Federal Government) gets on the job, I close down!"

New countries unchecked by conservative tradition, tend to develop freedom in legislative experiment at the cost of respect for law itself and the same irresponsibility in the use of the law-making power may perhaps be predicted of any country in which the legislators lack experience in the arts of government and the making of laws.

#### THE COMMONWEALTH OF AUSTRALIA.

The Australian Constitution was established by the Commonwealth of Australia Act (1900)

"*One Indissoluble Federal Commonwealth.*" and is founded on the agreement recited in the preamble that "whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on



the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established : " Though legal sovereignty still vests in the Crown and the Imperial Parliament, what we may call (a little more loosely) political sovereignty resides in the people of the Commonwealth ; and they have united together, for all time, in one indissoluble federal state.

The executive authority of the Commonwealth is vested in the Crown, but is exercisable by the Governor General as the representative of the Crown and extends to the execution and maintenance of this constitution, and of the laws of the Commonwealth. It is in some respects wider than the executive scope of the United States Government, narrower than the Canadian and much narrower than the South African or the German Republic. It approximates to the British in its close relation to the legislature, but the practice of federalism leads the Supreme Court to find in the United States more than elsewhere the reservoir of precedents for its judgments on the constitutional status of the Commonwealth and of the Australian States.

Now, the Federal Executive Power, while separately described in Chapter Two of the Australian Constitution, is not a separated function like the United States Government. Section 61 of Chapter II does indeed vest the executive power of

*Federal Executive and Legislature bound together.* the Commonwealth in the Governor General acting for the Crown and thus gives him an apparently independent status : but section 62 provides for his advisers thus :—

“There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor General and sworn as Executive Councilors, and shall hold office during his pleasure.”

Section 63 declares that :—

“The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.”

The critical part of all these sections is the last paragraph of section 64, for by it the Australian Ministry is placed in the Australian Parliament, and neither the Governor General nor the Governor General in Council can move far or live long without the assent of Parliament. Whether this is entirely appropriate to a federal state is perhaps open to doubt, but Australia in seeking from the Imperial Parliament a Constitution of her own naturally followed the example of Westminster, though in some respects showing that she was aware of the value of American precedents. The close association of the executive and legislative powers makes the character of the legislative functions of the Commonwealth even more important in Australia than they are in America : and, conversely, the executive government progressively tends to lose its unfettered discretion even in those matters explicitly assigned to it by the Constitution.

The scope of these matters is defined by parts  
*What the Governor* or the whole of twelve sections  
*nor General may do.* of the Act. The Governor  
General

- (1) may appoint the times for the holding  
the sessions of Parliament (section 5) ;

- (2) may prorogue Parliament (section 5) ;
- (3) may dissolve the House of Representatives (section 5) ;
- (4) shall notify to the Governor of a State interested the happening of a vacancy in the Senate (section 21) ;
- (5) may recommend to Parliament the appropriation of revenue or money (section 56) ;
- (6) may dissolve the Senate and the House of Representatives simultaneously (section 57) ;
- (7) may convene a joint sitting of members of both Houses (section 57) ;
- (8) may assent in the Queen's name to a proposed law, or withhold assent, or reserve the law for the Queen's pleasure (section 58) ;
- (9) may recommend to Parliament amendments in proposed laws (section 58) ;
- (10) may exercise, as the Queen's representative, the executive power of the Commonwealth (section 61) ;

- (11) shall choose and summon members of the Federal Executive Council, and may dismiss them (section 62) ;
- (12) may appoint officers to administer departments of State, and may dismiss them (section 64) ;
- (13) may, in the absence of Parliamentary provision, direct what offices shall be held by Ministers of State (section 65) ;
- (14) as the Queen's representative has the command-in-chief of the naval and military forces (section 68) ;
- (15) may proclaim dates when certain departments shall be transferred to the Commonwealth (section 69) ;
- (16) may, " in respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth," exercise all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a colony (section 70) ;

The statutory powers of the Governor General in Council are contained in eight sections thus :—  
*What the Governor General in Council may do.*

### The Governor General in Council

- (1) may issue writs for general elections of the House of Representatives (section 32) ;
- (2) may issue writs for elections to fill vacancies in the House of Representatives (section 33) ;
- (3) may establish departments of State (section 64) ;
- (4) may appoint and remove all officers except Ministers of State (section 67) ;
- (5) may exercise, "in respect of matters which under this Constitution pass to the Executive Government of the Commonwealth," all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a colony with the advice of his Executive Council (section 70) ;

- (6) shall appoint the Justices of the High Court, and may appoint Justices of other Federal Courts (section 72) ;
- (7) may, on addresses from both Houses, remove Justices of the High Court and of other Federal Courts (section 72) ;
- (8) may draw money from the Federal Treasury and expend the same until the first meeting of the Parliament (section 83) ;
- (9) may appoint members of the Inter-State Commission (section 103) ;
- (10) may, on addresses from both Houses, remove members of the Inter-State Commission (section 103).

The practice of responsible government, *i.e.*, a government belonging to, and depending upon the will of, a popularly elected legislature, tends to reduce all these powers to a common term. Indeed, Quick and Garran, in their *Annotated Constitution of the Australian Commonwealth* (published in 1901, before the Constitution had come into full operation) declared that “whilst, therefore, in this Constitution

some executive powers are, in technical phraseology, and in accordance with venerable custom, vested in the Governor-General, and others in the Governor-General in Council, they are all substantially in *pari materia*, on the same footing, and, in the ultimate resort, can only be exercised according to the will of the people". One of the two authors, Sir Robert Quick, writing in 1919 (*"Legislative Powers of the Commonwealth and the States of Australia"*) said "the history of the Commonwealth shows that the Representative of the King in Australia has not always been a passive instrument in the hands of Ministers defeated in Parliament advising a dissolution. There have been, altogether, three decisive ministerial defeats in the House of Representatives, followed in each instance by the defeated Prime Minister applying to the Governor-General for the dissolution of Parliament and as many refusals to grant the same." The Governor-General has therefore not been reduced altogether to a cipher; but it remains true, none the less, that the Federal Legislature, in virtue of its control of the Australian Ministry, tends to become a factor more important than the executive in the working of Australian federalism.



As we have seen, the power of the executive government "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth," but the obligation to maintain "peace, order and good government"—a comprehensive duty usually explicitly laid upon a government as such—is more implicit than explicit. For instance, the power to deal, by force if necessary, with a recalcitrant State, might conceivably be exercised by the Federal Government, by implication under section 61, quoted above, but appears to belong more truly to that Government in virtue of sub-section (xxxix) of section 51 which empowers the Australian *Parliament* to make laws with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." The Australian Constitution having been designed to establish responsible parliamentary government, it would appear that the Federal Gov-

ernment would, in the case contemplated, seek its authority rather in an emergency federal law than in its own implicit powers.

The powers of the Australian Parliament are therefore of the first importance in the study of the federal system of the Commonwealth.

The grant of them is designed on the American plan. The Commonwealth of Australia Constitution Act, 1900, declares in section 9, Chapter I, Part I, sub-section (i), that :—

“ the legislative power of the Commonwealth shall be vested in a Federal Parliament..... ”

but this power is defined by the provisions of Chapter I, Part V, which limits the scope of the Federal Parliament to 39 subjects, with the addition of such matter as the site of the Federal Capital. Moreover, Chapter V, sub-sections 106 and 107, defines still further this limitation in the following words :—

“ 106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth or as at the admission or establishment of the State.

as the case may be, until altered in accordance with the Constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

The effect of these provisions is to leave the residue of power—as far as it does not still rest in the Crown and the Imperial Parliament—in the hands of the States composing the Australian Commonwealth.

Part V Chapter I of the Constitution of the Commonwealth, which composes clause 9 of *Subjects of the Act of 1900*, assigns to *Australian Federal* the Parliament of Australia *legislation*.

"the power to make laws for the peace, order, and good government of the Commonwealth with respect to:—

- (i) Trade and commerce with other countries and among the States :

- (ii) Taxation ; but so as to discriminate between States or parts of States :
- (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth :
- (iv) Borrowing money on the public credit of the Commonwealth :
- (v) Postal, telegraphic, telephonic, and other like services :
- (vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth :
- (vii) Lighthouses, lightships, beacons and buoys :
- (viii) Astronomical and meteorological observations :
- (ix) Quarantine :
- (x) Fisheries in Australian waters beyond territorial limits :
- (xi) Census and statistics :

- (xii) Currency, coinage, and legal tender :
- (xiii) Banking, other than State banking ;  
also State banking extending beyond the  
limits of the State concerned, the incor-  
poration of banks, and the issue of  
paper money :
- (xiv) Insurance, other than State insurance ;  
also State insurance extending beyond  
the limits of the State concerned :
- (xv) Weights and measures :
- (xvi) Bills of exchange and promissory notes :
- (xvii) Bankruptcy, and insolvency :
- (xviii) Copyrights, patents of inventions and  
designs, and trade mark.
- (xix) Naturalisation and aliens :
  - (xx) Foreign corporations, and trading or finan-  
cial corporations formed within the limits  
of the Commonwealth :
- (xxi) Marriage :
- (xxii) Divorce and matrimonial causes ; and in  
relation thereto, parental rights, and the  
custody and guardianship of infants :
- (xxiii) Invalid and old age pensions :

- (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States :
- (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and judicial proceedings of the States :
- (xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws :
- (xxvii) Immigration and emigration :
- (xxviii) The influx of criminals :
- (xxix) External affairs :
- (xxx) The relations of the Commonwealth with the islands of the Pacific ;
- (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws :
- (xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth :

- (xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State :
- (xxxiv) Railway construction and extension in any State with the consent of that State :
- (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State :
- (xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides :
- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopts the law :
- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which

can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia :

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

The powers of the Australian States are nowhere defined in the Commonwealth Constitution because the position assigned to them, like the position of the individual States in America, is that of the holders of the residue of sovereignty, or at least the sharers of it with the people. The States, recited by name in the Preamble of the Act of 1900,

*The Powers of the* are united in one indissoluble  
*States.* Federal Commonwealth and

thus form and remain parts of that Commonwealth ; but the original impetus to union, as well as the sanction for it, came from the people and it is by the authority of the people alone, and not of the



States or of the Commonwealth acting in Parliament that the Constitution can be amended. By sections 106 and 107 the Constitution and powers of the State Parliaments existing at the time of the passing of the Act are explicitly safeguarded. The Legislature of each State, popularly called the Parliament, is the creation of the Constitution of the State and not of the Commonwealth Constitution. The States inheriting the powers of the former colonies are maintained by the Commonwealth Constitution in their original structural form, and only relinquish the minimum of powers necessary to equip the Federal Government with the essential instruments of its federal duty.

We have seen that the Constitution in Section 51 assigns to the Australian Parliament thirty-nine subjects of legislation covering a wide area of

*Relation between public affairs, and in section 52 Federal and State the exclusive power to make laws Powers.* is assigned with respect to:—

- “(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:
- (ii) Matters relating to any department of the public service the control of which is by

this Constitution transferred to the Executive Government of the Commonwealth :

- (iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament."

Of the thirty-nine powers, however, of section 51, thirteen were new at the passing of the Act, were only applicable to the Commonwealth as a whole, and were created by the Constitution to vest in the Federal Parliament because they were essential to the performance of certain duties naturally belonging to a sovereign or a quasi-sovereign government. Three more, formerly vested in the States, or partially so, are now exclusively within the competence of the Federal Parliament :—

- (1) Bounties (except bounties on mining for gold, silver or other metals), a subject governed by the provisions of section 91, which runs as follows :—

" Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals nor from granting, with the consent of both Houses of the Parliament of the

Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.”

- (2) Naval and military defence, with respect to which section 114 explicitly says :—

“ A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.”

- (3) Coinage and legal tender.

With these subtractions there remain twenty-  
*Concurrent powers* three powers formerly belonging  
*in legislation.* to the States, but now within the  
concurrent legislative powers of the Federal and  
State Parliaments, subject always to the condition  
of section 109, which runs as follows :—

“ When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

These powers are as follows :—

- “(1) Astronomical and meteorological observations (*viii*).
- (2) Banking, other than State banking ; also State banking extending beyond the limit of the State concerned, the incorporation of banks, and the issue of paper money (*xiii*).
- (3) Bankruptcy and insolvency (*xvii*).
- (4) Bills of exchange and promissory notes (*xvi*).
- (5) Census and statistics (*xi*).
- (6) Copyrights, patents of inventions and designs, and trade-marks (*xviii*).
- (7) Divorce and matrimonial causes ; and in relation thereto, parental rights, and the custody and guardianship of infants (*xxii*).
- (8) Foreign corporations, and trading or financial corporations formed within the Commonwealth (*xx*).
- (9) Immigration and emigration (*xxvii*).
- (10) Influx of criminals (*xxviii*).
- (11) Insurance, other than State insurance also State insurance extending beyond the limits of the State concerned (*xiv*).
- (12) Invalid and old-age pensions (*xxiii*).

- (13) Light-houses, light-ships, beacons and buoys (*vii*).
- (14) Marriage (*xix*).
- (15) Naturalization and aliens (*xix*).
- (16) People of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws (*xxvi*).
- (17) Postal, telegraphic, telephonic, and other like services (*v*).
- (18) Quarantine (*ix*).
- (19) Railways, control with respect to transport for naval and military purposes of the Commonwealth (*xxxi*).
- (20) Railway construction and extension in any State with the consent of that State (*xxiv*).
- (21) Taxation ; but so as not to discriminate between States or parts of States (*ii*).
- (22) Trade and commerce with other countries, and among the States (*i*) ; except that on the imposition of uniform duties of customs the power to impose duties of customs and excise becomes exclusively vested

in the Federal Parliament (section 90).

(23) Weights and measures (xv).

We may observe that the Constitution laid upon the Federal Power the obligation to impose uniform duties of customs within two years after the establishment of the Commonwealth, and that thereafter, with the exception of bounties on mining, the power of Parliament to impose duties of customs and of excise and to grant bounties on the production or export of goods became exclusive. With reference to the operation of section 109, Mr. Justice Isaacs (in the *Federated Saw Mill, etc. Employees of Australasia v. James Moore and Son Proprietary Limited*, (1909) 8 C. L. R., at page 530) said :—

“ Section 109 of the Constitution itself is explicit. The true way to test the argument in the present case is to ask whether the Federal Act would be valid supposing the State Act were non-existent. If it would, then, in case of inconsistency the State law, whatever it may be, under whatsoever power it is enacted, on whatsoever subject, must to the extent of the

inconsistency be invalid. This constitutional provision is essential to the very life of the Commonwealth; a decision in favour of the respondents on this point destroys the supremacy of Federal law, which alone has held the American union intact, has preserved the character of the Canadian Dominion, and can uphold the Australian Constitution."

The residue of legislative powers left to each State  
*Residuary Legis-* naturally covers such questions  
*lative Powers.* as Agriculture, Banking, Borrowing money on the sole credit of the State, Charities, Municipal and other Corporations, Civil and Criminal Courts, Education, Factories, Fisheries (excepting questions arising out of territorial waters), Forests, Friendly Societies, Games, Health and Sanitation, Insurance, Intoxicants, Justice, Land, Licences, Police, Prisons, Railways (in a limited sense), Rivers (again under limitations), Taxation within certain limits, Trade and Commerce within the State, Construction of Public Works, and so on. In addition to all these, the Parliament of a State is entitled not only to maintain and execute the Constitution of the State but also to amend it.

Another provision of the Constitution, section 94, following the provision of *The Distribution of Surplus Commonwealth Revenue.* uniform duties of customs to be imposed by the Commonwealth, says :—

“ After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.”

This may be taken to show that the authors of the Constitution, while willing to give large financial powers, in taxation and in the borrowing of money, to the Federal Government, did not intend that the Federal Government should be the sole beneficiary of their exercise. The operation, however, of this particular provision has created difficulties ; and the Supreme Court has delivered a series of judgments on the question of the precise limits of legitimate Federal expenditure which must (or may) be reached before the reckoning of this surplus begins. I understand, though at the moment accurate information is lacking, that the relations between the Federal Government and the States



under section 94 are now regulated by an explicit agreement. Customs and Excise Revenue is collected by the Commonwealth and is repaid to the States to the extent of twenty-five shillings per head of the population.

We are now in a position to describe with greater fullness the design of the Australian Constitution. The Australian Commonwealth is the united political community, established by the Imperial Parliament, composed of the people and the antecedent colonies, converted since 1900 into States. It is endowed with powers of self-government which amount to practical sovereignty, though in the constitutional and legal sense sovereignty proper still resides in the Imperial Parliament. In practice, and particularly in British practice, from the moment that the Imperial Parliament recognised the unity and indivisibility of the Commonwealth and assigned to the Australian People some of the highest attributes of sovereignty, from that moment the power of the Imperial Government to restrain Australia from doing what she wished to do ceased to exist. But the sovereignty passed not to any one Australian destination; for it is now shared between

the people, the State legislatures and the Australian Parliament. By the assignment of subjects, each of these parts is kept separate. The Federal Government is separate from the State Governments. Their spheres of action are so marked out as to prevent each from encroaching upon the other; and only the people as a whole can authorise any change in this distribution. The dual system is thus one of the essential features of the Australian, as of the American, federal union. "It may be

*Its dual character.* added," say the authors of the *Annotated Constitution of the Australian Commonwealth*, "that the governing powers reserved to the States are not inferior in origin to the governing powers vested in the Federal Government. The States do not derive their governing powers and institutions from the Federal Government, in the way that municipalities derive their powers from the Parliament of their country. The State Governments were not established by the Federal Government, nor are they in any way dependant upon the Federal Government, except by the special provisions of section 119. The States existed as colonies prior to the passing of the Federal Constitution, and possessed their own charters of government, in the shape of the Constitutions granted to

them by the Imperial Parliament. Those charters have been confirmed and continued by the Federal Constitution, not created thereby. Hence, though the powers reserved to the States are not wide, general, and national, no badge of inferiority or subordination can be associated with those powers, or with the State institutions through which they are exercised. State powers and State institutions, Federal powers and Federal institutions, all sprang, originally and directly, from the same supreme source—British sovereignty. The Federal Government and the State Governments are in fact merely different grantees and trustees of power, acting for and on behalf of the people of the Commonwealth. Each of them has to exercise its powers within the limits and in the manner prescribed by the Constitution; each of them has different powers to be used in different domains for different purposes. The Constitution is the title, the master, and the guardian of all these various governing agencies. At the back of the Federal and State Governments are the *quasi*-sovereign people of the Commonwealth, organized within the Constitution as a *quasi*-national State; they can alter the instrument of government, abolishing existing institutions of government, and substituting

new ones, subject only to its special provisions and the Imperial supremacy. The States, therefore, as governing organizations, are not inferior in origin or status to the Federal governing organizations. Both are equally subject to the law of the Constitution, and equally entitled to its protection."

The Australian Constitution is but twenty-five years old, and has not, therefore, the same wealth

*The Commonwealth only twenty-five years old.* of lessons to teach as the American. As in the case of America, it was the threat, and then the fact, of war, which brought home to the Australian people as a whole the importance of a powerful Federal Government. Australia, conscious of a greater degree of isolation from the rest of the Empire than the other Dominions, and therefore of risks to the integrity of her territory, early imposed upon her citizens the duty of military service. This act, more than any other, established in the mind of Australia the importance and power of Parliament. When the war itself broke out, and particularly during its later stages, it was revealed to Australians that under the power to organise the defence of Australia the Supreme Court acknowledged

the right of the Federal Government to exercise powers and perform acts of which the authors of the Constitution itself never dreamed. None the less, on such a vital matter as the control of food supply and of prices in times of emergency, the Australian Cabinet in 1919 found itself in a position of such uncertainty that, when Mr. W. M. Hughes (then Prime Minister) returned to Australia after the Peace Conference, he found a movement of public opinion in progress of which the main motive was a vehement demand for increased Federal powers "to enable the Commonwealth, Parliament and Government to grapple with the whole question. In England the preventive legislative measures were in the direction of decentralisation, whilst in Australia it appeared that there was no hope to grapple with the mischief except in the direction of Commonwealth centralisation and Commonwealth bure-

*Food control in 1919: an object lesson in the working of a federal system*      aucracy." The reason why the policies of food control in Great Britain and in Australia appeared so greatly to diverge was that the Imperial Parliament, being sovereign, could do what it liked, while the discretion of the Australian Cabinet was fettered by the existence

of definite rights to control commerce, etc., within a State which each of the State Governments and Legislatures possessed. Now, under the Constitution as it stands at present,\* the Commonwealth has power to legislate with respect to trade and commerce "with other countries and among the States." Briefly expressed, this means that "Continental and external commerce is federalised, while intra-State commerce—that is, buying and selling transactions which begin and end in the State—are subject exclusively to State laws." With the modern organisation of the manufacture, sale and distribution of food products on a large scale, Australia has found that in this vital matter power at the centre is the only effective power.

The Australian Parliament consists of two Chambers, the House of Representatives and

*The Federal Principle in the Composition of the Australian Parliament.*

the Senate. The House of Representatives is composed of "members directly chosen by the People of the Commonwealth" (section 24), and is, like the American House of Representatives, the popular House

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\*or to be strictly accurate, as it stood in 1920, for accurate information is at the moment lacking in India.

representing the nation as a whole. The Senate is "composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate" (Section 7), and is thus the Federal House resting upon the foundation of State representation.

"The Senate as framed by the Federal Convention" says Sir John Quick, in "*The Legislative Powers of the Commonwealth and the States of Australia*", "was one of the most conspicuous and certainly the most important of all the Federal

*The Senate as the embodiment of the Federal Principle.* features of the Constitution, using the word Federal in the sense of linking together and uniting a number of co-equal political communities under a common system of government. The Senate was designed to be not merely a branch of a bicameral Parliament; nor merely a second chamber of revision and review representing the sober second thought of the nation, such as the House of Lords is supposed to be in the British Constitution; it was intended to be all that, but something more than that, it was to be the chamber in which the Australian States, considered as separate entities and corporate parts

of the Commonwealth were represented. They were to be so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation of their grievances. It was not deemed sufficient that they should have a Federal High Court to appeal to for the review of Federal legislation which they might consider to be in excess of the jurisdiction of the Federal Parliament. In addition to the legal remedy it was considered advisable that original States, at least, should be endowed with a parity of representation in one Chamber of the Parliament for the purpose of enabling them to effectively resist, in the legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States."

"The ideal Senate of the Convention has not been realized; the Senate has  
"..... *The Senate* ..... *one of the great* ..... *disappointments of* *federation.*"  
this case the framers of the Constitution did not build better than they knew. They designed and built according to their



lights, and according to precedents. They expected that the Senate would attract to its membership all the best and strongest representative men in Australia to whom the motto would be "None for Party, all for the State"; this anticipation has not been realized. In actual practice the Senate has become a Chamber composed of members representing political parties similar in composition to those of the House of Representatives. Instead of being a Council of States, it has become a party chamber. The principle of equality of State representation in the Senate was conceded for the protection of State rights and not for the representation of political parties. This unexpected development has been brought about to some extent by the evolution of new political parties and new political forces in Australia which were beyond the ken and vision of the framers of the Constitution. It was never expected that political organization and machine politics known as the Caucus system and the system of voting by party tickets would become within a few years after Federation such a perfect science, that the electors would practically be deprived of the right of choosing and nominating candidates for the Senate and that such choice and nomination

would by party organization and party discipline become the monopoly of a few and that in voting for candidates for the Senate electors would be required to vote for bunches of men whose names are bracketed together in a ticket, thereby excluding the nomination of desirable candidates who would not stoop or bow down to party managers and party organizers. Whatever objections may be taken to the choice of American Senators by the various State Legislatures, *anti-democratic* as it is, it has not had the effect of excluding from the American Senate, the strongest, the most gifted and most eloquent statesmen in the United States."

"It has been proposed that there should be  
*Suggested reform* a reform in the method of  
*of election procedure* choosing members of the Aus-  
*for the Senate.* tralian Senate by abolishing  
the one electorate in each State provided by the  
Constitution, section 7, and by substituting  
three electorates in each State, each of the three  
electorates returning two Senators retiring by  
rotation one every three years. Such a reform  
would be within the competence of the Parlia-  
ment of the Commonwealth to adopt, as the  
present method of voting in one electorate in each

State is only a temporary one to remain until the Parliament otherwise provides. Such a change might possibly be an improvement on the existing system and would prevent the Senate elections from being such a scramble as they are at present, when thousands of electors in Australia go to the poll and vote blindly not knowing anything about the Senate candidates, for whom they vote according to party ticket, whilst thousands of others vote carelessly and recklessly with absolute disregard to the names or identity of the candidates opposite whose names they place the regulation mark."

Australian experience points to the necessity of making the Senate, in a Federation, as effectively as possible, the genuine representative of each and all of the component parts of the Union. It must be representative not in the sense of counting heads but avowedly in the sense of maintaining the corporate union and true interests of the State as a political and economic unit distinct from, though forming part of, the whole Commonwealth, in a manner which cannot be suddenly influenced by swift, conflicting and irrelevant movements of political opinion and

party fortune. It may be that in a federal country in which the people, despite their federation into separate States, are truly homogeneous, both in race and religion, the failure of the Senate to discharge its true federal mission need bring no disaster in its train. In any country where such homogeneity does not exist and where the local units (be they called Provinces or States) have a distinctive character and distinctive social interest of their own, the importance and the federal purpose of the Senate, acting as Second Chamber, are greatly increased.

#### CANADA.

The British North America Act, 1867, set up the Dominion of Canada composed of four Provinces, Quebec, Ontario, Nova Scotia, and New Brunswick, federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution which the Preamble to the Act describes as "similar in principle to that of the United Kingdom." The Constitution was in principle *not* similar to that of the United Kingdom, though in the practice of responsible government, with a Cabinet sitting

in Parliament, it was in one grand essential an almost exact copy of British practice. Where it departed from the British Constitution in principle lay in the fact that it was explicitly created to be a federation, and not a unitary state.

The Act (section 9) vests the executive Government of Canada in the Queen *with the residue of powers vested in the Federal Government.* and (section 17) declares that “there shall be one Parliament for Canada.....” Section 91, moreover, runs as follows :—

“It shall be lawful for the Queen, by and with the advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces ; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends

to all Matters coming within the Classes of Subjects next hereinafter enumerated."

The important words here are "all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; . . . but not so as to restrict the Generality, etc." These words are the constitutional antithesis of the words "herein granted" in the American Constitution.

*Extent of the legislative authority of the Parliament of Canada.* The powers explicitly given to the Federal Parliament are recited in section 91. They relate to :—

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and *Sable Island*.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."



*Subjects of exclusive provincial legislation.*

Section 92 limits the exclusive powers of the Provincial Legislatures of the Canadian Provinces to the following subjects :—

- “ 1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes :—
  - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs and other Works and Undertakings connecting the Province, with any other or others of the Provinces, or extending beyond the Limits of the Province :
  - (b) Lines of Steam Ships between the Province and any British or Foreign Country ;
  - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the

general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province ”.

The relation between the Federal Government and a Canadian Province is thus that of superior

and subordinate ; and the principle of the Constitution is that the Federal Government and Parliament possess together an all-pervading authority over Canada, except where the British North America Act assigns the subjects of section 92 to the Provinces. Such is the theory of the matter, but successive judgments of the Judicial Committee have tended to raise the importance of the Provinces by a comparatively generous interpretation of the terms of sub-section (16) of section 92 quoted above. In this sub-section there is a feasible loophole for interpretations of this kind. No doubt the expansion of provincial prerogatives cannot be carried far even by the most extravagant interpretation of the sub-section ; but in such matters as the conflicts arising out of Prohibition it has been shown that the legislative or administrative action of a Province may have much wider effect upon the policy of the Dominion as a whole than was ever intended by the Imperial Parliament, or indeed by the people of Canada when they sought the authority of Parliament for the creation of the Dominion.

The Dominion and the Provinces possess concurrent powers in legislation over Agriculture and Immigration in the following manner :—

95. In each Province the Legislature may make laws in relation to Agriculture in the Province, and to Immigration into the Province ; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces ; and any law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

A still more remarkable case of co-operation, if not concurrency, in respect of certain uses of the Legislative power is to be found in Section 94 which declares :—

94. Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the Courts in those three Provinces ; and from and after

*Concurrency in the Laws establishing uniformity in all legislation concerning Property and Civil Rights in Ontario, Nova Scotia and New Brunswick.*

the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted ; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof.

It is perhaps worth noting that Mr. Justice Clement, Judge of the Supreme Court of British Columbia, in his " Law of the Canadian Constitution," after pointing out that " the exact position of the line which is to divide matters of common concern to the whole federation from matters of local concern is not of the essence of federalism," says that " the maintenance of the line, as fixed by the federating agreement is of the essence of modern federalism ; at least, as exhibited in the three great Anglo-Saxon federations of to-day, the United States of America, the Commonwealth of Australia, and the Dominion of Canada." Now, though in each case the Constitution professes to draw a well-

marked line between the two parts of the Federation, none the less the Courts, and particularly in each case the Supreme Court, have been continually exercised over questions of constitutional interpretation. The importance of the duty thrown upon the Courts in this respect can hardly be exaggerated. The Canadian Constitution differs from the standard federal form, in that it recites both the subjects allotted to the Federal Government and those allotted to the Provinces. And, despite the vital words quoted in italics on page 47, it is probably this double recital which has led to conflicting interpretations not only of particular allotments in the two lists but also of the very principle upon which the whole allotment proceeds. Thus, Lord Watson, in delivering judgment in the Privy Council in the Liquidator's Case (1892, A. C. 437 ; 61 L. J. P. C. 75), said :—

“ The object of the Act (*i.e.*, the British North America Act which embodies the Canadian Constitution) was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be

represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers, executive and legislative, and all public property and revenues which had previously belonged to the provinces, so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government."

And Mr. Justice Clement, continuing the argument, declares that "they (*i.e.*, the Canadian people) agree to commit themselves to the control of one common government in relation to such matters as are agreed upon as of common concern, leaving each Local Government still independent and autonomous in all other matters." That is precisely and deliberately what the Canadian Constitution does not enact; but the fact that an experienced Judge of a Canadian Court can



place this statement on record may reasonably lead to the entertainment of a doubt whether the form in which the allotment of powers is enacted in the Canadian Constitution is the best. Further, Mr. Justice Clement points out that "the parliament of Canada may deal with matters which are local or private and as such within the ordinary scope of section 92 in cases where such federal legislation is 'necessarily incidental' to the exercise of the powers conferred upon the parliament of Canada by the enumerative heads of section 91."

"Again, the jurisdiction of the Dominion parliament under the opening  
*The Courts as Interpreters.* 'peace, order, and good government' clause of section 91 has been held to be 'strictly confined to such matters as are unquestionably of Canadian interest and importance.' The Courts must accept the heavy responsibility of deciding this question of fact. In the Local Prohibition Case (1896, A. C. 348; 65 L. J. P. C. 26), their Lordships of the Privy Council speak of being relieved of this responsibility in reference to the Canada Temperance Act by the previous decision of the Board in Russell's Case (7 Appendix Case 829; 51 L. J. P. C. 77). No

Dominion statute has yet been held *ultra vires* upon this ground as a colourable invasion of the provincial field unless, indeed, the decision of the Privy Council holding invalid the Dominion Liquor License Acts, 1883 and 1884 (commonly called the McCarthy Act, see 4 Cart. 342 n.), was based upon this view; but as no reasons were ever published, this must remain uncertain. To what extent the Courts may, in deciding such a question of fact take judicial notice of conditions, political, social, and industrial, throughout the Dominion may be a very difficult problem. It was held in an early case that the onus is on those who assert that a matter in itself local or provincial does also come within one of the enumerated classes of section 91 (*L'Union St. Jacques v. Belisle*, L. R. 6 P. C. 31, referred to with approval in *Dow v. Black*, ib. 272; 44 L. J. P. C. 52); and it may well be argued that the onus would be still harder to satisfy if it were sought to have it established that the matter was unquestionably one of Canadian interest and importance (see Re-Insurance Act, 1910, 48 S. C. R. at p. 307, per Anglin, J.)."

A somewhat different conclusion in the matter is stated by Mr. Justice Riddell of the

Supreme Court of Ontario in his Columbia University Lectures entitled "*The Canadian*

*Constitution in Form and in*

*Mr. Justice  
Riddell's views.*

*Fact* :—"From what has been said, it is manifest that the

Dominion has, in law, full control over Provincial legislation for a year; and, therefore, it might be inferred that Provincial legislation allowed to become law could never be found to trench upon the field of the Dominion. But sometimes Acts which do not seem to the Dominion Ministry to be objectionable, even when petitioned against by parties interested, and are consequently not disallowed, are afterwards found objectionable; sometimes, too, the full effect of a statute has not appeared until after the lapse of time. Any litigant may set up the invalidity of a statute, Dominion or Provincial—and the matter may be of such importance that the Dominion or Provincial authorities or both may intervene. When the validity of a statute is brought in question, the Court must decide according to the strict law—nothing is of consequence but the legal power. The B. N. A. Act is then interpreted in the same way and on the same principles as the Constitution of the United States is interpreted in American Courts."

A further feature in which the Canadian Constitution is singular is that of the disallowance of local Acts. The procedure by which disallowance is effected is not clearly laid down

*Federal Disallowance of Provincial Acts.*

in the Constitution, but Mr. Justice Clement, in the book quoted, assumes that, since the Governor General under section 90 possesses certain of the prerogatives of the Crown, including the right of veto and legislation, and since the form of Canadian government is that of responsible government, these powers are exercised in practice by the Canadian Cabinet. This view, moreover, finds support in the statement by Mr. Justice Riddell that "anyone affected by a provincial measure may petition for its disallowance at Ottawa: in some cases parties are heard by Counsel before the Minister of Justice". The most recent case of such a petition was that of John D. Roberts, the editor of "The Axe," a Montreal weekly, which, in its issue of October 27, 1922, published an article saying that the names of two Members of the Legislature were being coupled with those who were arrested for the particularly shocking murder of a young girl in Quebec in

1920. "The Axe" declared that it was being freely and openly said in Montreal that the indolence of the authorities in clearing up the mystery was due to the fact that these two Members of the Legislature were supposed to be implicated. "The Legislature was then in Session; the article was called to their attention, John D. Roberts, the editor of "The Axe" and President of the publishing company, was arrested and brought before the Legislative Assembly; he was questioned and refused to give the names of the two Members; the House declared him guilty "of having assailed its honour and its dignity by slandering two of its members in the most odious and atrocious manner; a Bill was passed, *nem con*, by the House, concurred in by the Legislative Council and assented to by the Lieutenant-Governor, December 29, 1922, to imprison Roberts for one year in the Common Gaol at Quebec; Roberts was taken to the Gaol the same day where he remained for more than three months. A writ of *Habeas Corpus* was refused by a Judge of the Superior Court at Quebec and by a Judge of the Supreme Court of Canada. An application was made to the Ministry at Ottawa to annul

this Act ; but before a decision was arrived at, Roberts admitted his error and he was released, April, 1923 .”

“ I know no better illustration of the different connotations of the word “ constitutional ” than is afforded by this case. Throughout Canada there was much comment upon the action of the Quebec Legislature in passing what was considered to be in effect *ex post facto* legislation to punish a past offence. Such a proceeding was argued to be unconstitutional in our British sense, *i.e.*, a contention was made that it was contrary to the established principles of free government and to British usage in recent years.”

“ The matter was discussed at a succeeding General Election in the Province at which the Government was sustained ; consequently it must be considered that the people of that province did not disapprove—and they are the ultimate authority. The Act, however, was of an extraordinary character and it is not likely to be followed frequently as a precedent.”

*Special appeal provided in respect of Education from Province to Federal Government.*

But observe also the influence of local conditions in the provisions of section 93, which runs as follows :

“ 93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions :—

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union.
2. All the powers, privileges, and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be, and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.
3. Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor General in Council from any Act or decision of any Provincial

authority affecting any right of privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

4. In case any such Provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor General in Council under this section .”

Here Education is made the subject of special provision because the French Catholics and the British Protestants feared sectarian injustice in any province where they were in a minority. We may note also that communal and sectarian



differences have laid their mark on the provisions governing the Amendment of the Constitution (see Chapter V).

We have seen above that the Federal Union of Canada presents certain variations from the standard form. In two other respects besides

*Departures from standard federal form: (a) in the composition of the Senate,* those already described it follows a line of its own. Usually, *e.g.*, Imperial Germany, the United States of America, Australia, the Second Chamber is made the Chamber of States Rights. Election to a federal Second Chamber is usually conducted on a basis different from that designed for the First Chamber, with the special object of differentiating between the interests of the nation as a whole as represented in the latter and the corporate economic and political interest of the States as separate constitutional units. The Canadian Constitution places the personnel of the Senate entirely in the choice of the Governor General. No element of election enters. In the exercise of the practice of responsible government, nomination to the Senate by the Governor General means nomination by the Party in power. The Canadian Senate, which gradually becomes the

handmaid of the Government of the day provided the Government remains long enough in power, has little interest for us as a federal institution. It is perhaps worth noting, before passing from the subject, that, judged purely on a federal basis, few if any of the Second Chambers in Federal Constitutions have fulfilled the expectations of their founders. The Senate of the United States of America is indeed a most powerful body, not however for the reason for which its creators attributed growing power to it, but by reason of the actual powers which it possesses and the positive executive functions which it habitually exercises. The longer term of a Senator's service, as well as the actual continuity of the Senate itself, also contribute largely to the greater repute in which the Senate is held above the house of Representatives.

The manner in which the Canadian Constitution can be amended is dealt with in greater detail

(b) *in the amendment of the Constitution.* in Chapter V, but we may glance at it here as another feature in which Canada departs from the standard form. Usually Federal Constitutions are amended by an elaborate and deliberate process by which certain proposals for

amendment are set in motion by the Legislature or by popular demand otherwise expressed and are thereafter referred to the vote of the whole people, or in some cases to a prescribed majority vote of the Local Legislatures. In Canada, communal apprehensions, voiced particularly by the French Catholics, a religious minority in a position not unlike that of religious minorities elsewhere, laid their mark upon this part of the Constitution. There is no power in Canada to amend the British North America Act; and every proposal for amendment must be made in the Imperial Parliament, that is to say, in this constitutional provision Canada enjoys a more restricted discretion than any other British Dominion. In fact, of course, the Imperial Parliament could enact nothing in the way of Canadian constitutional amendment except on the invitation, and with the assent, of the Canadian people and Parliament.

#### SOUTH AFRICA.

The three constitutions described in the foregoing pages embody and illustrate three component parts of a true federalism:—(1) the supremacy of the Constitution; (2) the function

*South Africa not a truly federal state.* of the Courts as interpreters of the Constitution; (3) the assignment of functions and powers to the Central and to the Local Governments, each in proportion to the assumed needs or rights of the interests which the particular Government represents.

The provisions of the South Africa Act, 1909, do not carry out these principles and thus the *South African Parliament is supreme.* South African Constitution, while possessing some federal features, is not a true federal Union. In respect of the first of the three principles enumerated above, Parliament, not the Constitution, is supreme: or at all events the supremacy of Parliament is only limited by the greater supremacy of the Imperial Parliament. The Honourable R. H. Brand, who as Secretary of the Transvaal Delegates to the South African National Convention of 1908-09 speaks with peculiar authority, says:—

“It is from the principle of the supremacy of Parliament that flow all the fundamental differences between a federal constitution and a unitary constitution such as that framed for South Africa.

The South African Parliament is not, it is true, supreme in the manner in which the British Parliament is supreme, because it is subject to the limitations which the British Constitution imposes upon all Colonial parliaments, and further because in the case of certain sections of the Constitution its plenary power of amendment is qualified. But in fact and in essence within South Africa it is all-powerful. In the case of the British Constitution the supremacy of Parliament has been called by Professor Dicey 'the clue to guide the inquirer through the mazes of a perplexed topic'. It is no less the first principle of the South African Constitution.....

.....In South Africa this fundamental principle of the supremacy of Parliament has in three colonies been greeted as the great achievement of

*Comparison with  
America and Australia.* the Act, and in the fourth has been condemned as a disastrous error.

But, notwithstanding the hot opposition of critics in Natal, which the history and circumstances of that colony

render natural, there is little doubt that opinion in South Africa is overwhelmingly in favour of the unitary as opposed to the federal principle. The panegyrics which American writers have been accustomed to lavish on the Constitution of the United States, and the imitation of that Constitution by Canada and Australia, probably explain the widespread opinion that federalism is a form of government to be sought as an end in itself, and not one which should be accepted only when nothing better can be obtained. But federalism is, after all, a *pis aller*, a concession to human weakness. Alexander Hamilton saw its dangers and only acquiesced because by no other means was union possible. In Canada Sir John MacDonald strongly favoured a legislative union, but was obliged to bow to the intense provincialism of Quebec. In Australia the narrow patriotism of the different states has imposed upon the Federal Government limitations which are generally admitted to be checking that country's advance. Federalism must be accepted where nothing better can be got, but its

disadvantages are patent. It means division of power and consequent irritation and weakness in the organs of government, and it tends to stereotype and limit the development of a new country. South African statesmen have been wise to take advantage of the general sentiment in favour of a closer form of union. It is remarkable that South Africans should have succeeded where almost all other unions have failed, in subordinating local to national feeling, and that the people of each colony should have been ready to merge the identity of their state, of whose history and traditions they are in every case intensely proud, in a wider national union, which is still but a name to them. The truth, as has already been stated, is that bitter experience has taught them the evils of disunion."

What the evils of disunion were is only too well

*The evils of dis-*  
*union.* known to students of South African history. Before the South African War, throughout the whole extent of the territory now embraced in the South African Union, the total number of white

inhabitants was little more than one million, who required for the administration of their affairs no less than four Governments. Inevitably, unity in policy, whether economic or racial, was lacking and the whole process of government was inefficient, cumbrous and expensive. "There were four Parliaments handling identical problems by means of differing laws ; there were four Courts interpreting these laws in diverse manners ; there were four Governors with their accompaniment of Government Houses, retinues, and staffs ; there were four Governments, driven in every sphere of their activity to recognise the necessity of unity and promptitude of action and yet failing to achieve either ; there were four treasuries, each borrowing money without regard to the needs of the others ; there were confusing differences in many of the laws, especially in such matters as patents, marriage, inheritance, and naturalisation. A man might be a British subject in the Cape Colony, but not in the Transvaal. Taken alone, all these elements of waste and confusion were a potent argument for Union."

The question here arises naturally, why include South Africa in a review of Federal Constitutions ?



*Why include South  
Africa at all?*

The answer is, first of all, that this monograph purports to present something more than a review of those Constitutions which faithfully portray the federal principle, for it is intended to deal with as many as possible of the varying relationships that have existed from time to time between Central and Local Governments. The second and even more cogent answer is that the history of South Africa in the first ten years of the present century, not to go further back, presents the most remarkable object-lesson available in our generation of the vital strength of those forces which make for union in a modern State. Remarkable as were the proceedings of the American Conventions from which the United States Constitution eventually emerged, the proceedings of the summer of 1908 and the winter of 1908-09 in South Africa are no whit behind them in constitutional importance or personal eloquence. It is no doubt true that, despite their remarkable services to South Africa, General Botha, General Smuts, Sir Starr Jameson, and the other personalities of that remarkable time were not figures of the same commanding stature as George Washington, Alexander Hamilton, Jefferson, and the other fathers of the

American Constitution. Moreover, it is perhaps a pity, though essential at the time, that the proceedings of the South African Conventions were confidential and that therefore some of the most interesting material in the discussion on federalism under contemporary conditions is still lacking to us. Were it fully available, I should have little difficulty in gleaning from it cogent material wherewith to justify the appearance of the South African Constitution in these pages. As it is, we know enough of the course through which events passed and of the conflicting opinions which met and eventually composed themselves in the South African Conventions to realise that nothing but the downright force of necessity could have persuaded Natal, for instance, to relinquish her local patriotism in order to form what is practically the unitary State of South Africa.

As we proceed with the examination of the South Africa Act, 1909, we shall see that, though unitary, the South African Constitution presents certain features which are not without their use in the study of Central and Local Governments.

“Whereas it is desirable for the welfare and future progress of South Africa that the several

*Preamble to the  
South Africa Act,  
1909.*

British Colonies therein should be united under one Government in a legislative union under the Crown of Great Bri-

tain and Ireland :

And whereas it is expedient to make provision for the union of the Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony on terms and conditions to which they have agreed by resolution of their respective Parliaments, and to define the executive, legislative, and judicial powers to be exercised in the government of the Union :

And whereas it is expedient to make provision for the establishment of provinces with powers of legislation and administration in local matters and in such other matter as may be specially reserved for provincial legislation and administration :

And whereas it is expedient to provide for the eventual admission into the Union or transfer to the Union of such parts of South Africa as are not originally included therein :

Be it therefore enacted.....  
.....

The kernel of this recital lies in the words "legislative union". They occur in the Constitution of no other British Dominion, nor in the American Constitution.

*Significance of the words "legislative union."*

They express at the very outset the fundamental principle on which the South African Constitution rests, namely, the supremacy of Parliament. Had the framers of the South Africa Act chosen to use the words which appear in the Preamble to the British North America Act, namely "A Constitution similar in principle to that of the United Kingdom," they would have been much nearer the truth than the framers of the Canadian Constitution were in employing those words to describe the Constitution of Canada.

By section 8, the executive government of the Union is vested in the King and administered by His Majesty in person or by a Governor General as his representative. Section 14, however, empowers the Governor General to appoint "officers not exceeding ten in number to administer such departments of State of the Union as the Governor General in Council may establish." Such officers hold office during the pleasure of the Governor General and

*Executive power.*

shall be members of the Executive Council and the King's ministers of State for the Union. Moreover, these ministers must be members of one or other House of Parliament. Thus, while section 8 preserves the theoretical sovereignty of the Crown, section 14 explicitly establishes parliamentary and responsible government.

Very wide powers indeed are given to the Governor General or to the Governor General in Council

*The scope of executive power in the Union.* cil by section 16 described in the rubric in the Act as the "transfer of executive powers to Governor General in Council." The actual terms of section 16 are as follows :—

" All powers, authorities, and functions which at the establishment of the Union are in any of the Colonies vested in the Governor or in the Governor in Council, or in any authority of the Colony, shall, as far as the same continue in existence and are capable of being exercised after the establishment of the Union, be vested in the Governor General or in the Governor General in Council, or in the authority exercising similar powers under the Union, as the case may be, except such

powers and functions as are by this Act or may by a law of Parliament be vested in some other authority."

Section 17 vests the command-in-chief of the naval and military forces of the Union in the Federal Government.

We have seen that South Africa is a legislative union and the corollary to the decision announced in the Preamble is to be found in the provisions of Chapter IV of the Constitution, which describes the composition, character and functions of the South African Parliament. Section 19 vests the legislative power of the Union in "the Parliament of the Union, herein called Parliament, which shall consist of the King, a Senate, and a House of Assembly." The powers of Parliament are not recited in detail, but section 59 endows it with functions which are little short of complete sovereignty :—

" 59. Parliament shall have full power to make laws for the peace, order, and good government of the Union."

Thus the Union is a unitary State with virtually all powers vested in the Central Government.

And, though the analogy cannot be pressed too far, there is some resemblance between the Constitution of South Africa and the Government of India Act. Let us examine the position of the South African provinces to see how far this is true.

Chapter V, which deals with the position of the South African provinces, authorises the appointment of a chief executive officer

*The limited powers of a South African province.*

by the Governor General who is styled the Administrator of the Province and in whose name all executive acts relating to provincial affairs therein are done. The Governor General in Council, in appointing this officer, is held to give preference where possible to persons resident in the province. The salaries of these Administrators are fixed by Parliament, that is, by the Union, and they are removable from office by the Governor General who, in taking action under this power, must communicate his reasons by message to both Houses of Parliament. The legislative authority of the province, it will be observed, is not even consulted.

“ 70. (1) There shall be a provincial council in each province consisting of the same number of members as are elected in the province for the House of Assembly : Provided that, in any province

whose representatives in the House of Assembly shall be less than twenty-five in number the provincial council shall consist of twenty-five members.

*The constitution of provincial councils.*

(2) Any person qualified to vote for the election of members of the provincial council shall be qualified to be a member of such council."

" 78. (1) Each provincial council shall at its first meeting after any general election elect from among its members, or otherwise, four persons to form with the administrator, who shall be chairman, an executive committee for the province. The members of the executive committee other than the administrator shall hold office until the election of their successors in the same manner.

(2) Such members shall receive such remuneration as the provincial council with the approval of the Governor General in Council, shall determine.

(3) A member of the provincial council shall not be disqualified from sitting as a member by reason of his having been elected as a member of the executive committee.



(4) Any casual vacancy arising in the executive committee shall be filled by election by the provincial council if then in session or, if the council is not in session, by a person appointed by the executive committee to hold office temporarily pending an election by the council."

" 80. The executive committee shall on behalf of the provincial council carry on the administration of provincial affairs. *Powers of provincial executive committees.* Until the first election of members to serve on the executive committee, such administration shall be carried on by the administrator. Whenever there are not sufficient members of the executive committee to form a quorum according to the rules of the committee, the administrator shall, as soon as practicable, convene a meeting of the provincial council for the purpose of electing members to fill the vacancies, and until such election the administrator shall carry on the administration of provincial affairs."

" 81. Subject to the provisions of this Act, all powers, authorities, and functions which at the establishment of the Union are in any of the Colonies vested in or exercised by the Governor or *Transfer of powers to provincial executive committees.*

the Governor in Council, or any minister of the Colony, shall after such establishment be vested in the executive committee of the province so far as such powers, authorities, and functions relate to matters in respect of which the provincial council is competent to make ordinances."

" 85. Subject to the provisions of this Act and the assent of the Governor General in Council as hereinafter provided, the provincial council may make ordinances in relation to matters coming within the following classes of subjects (that is to say) ;

<i>Legislative powers of provincial coun- cils.</i>	(i) Direct taxation with- in the province in order to raise a revenue for provincial purposes :
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(ii) The borrowing of money on the sole credit of the province with the consent of the Governor General in Council and in accordance with regulations to be framed by Parliament :

(iii) Education, other than higher education, for a period of five years and thereafter until Parliament otherwise provides :

- (iv) Agriculture to the extent and subject to the conditions to be defined by Parliament :
- (v) The establishment, maintenance, and management of hospitals and charitable institutions :
- (vi) Municipal institutions, divisional councils, and other local institutions of a similar nature :
- (vii) Local works and undertakings within the province, other than railways and harbours and other such works as extend beyond the borders of the province, and subject to the power of Parliament to declare any work a national work and to provide for its construction by arrangement with the provincial council or otherwise :
- (viii) Roads, outspans, ponts, and bridges, other than bridges connecting two provinces :
- (ix) Markets and pounds :
- (x) Fish and game preservation :
- (xi) The imposition of punishment by fine penalty, or imprisonment for enforcing

any law or any ordinance of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section :

- (xii) Generally all matters which, in the opinion of the Governor General in Council, are of a merely local or private nature in the province :
- (xiii) All other subjects in respect of which Parliament shall by any law delegate the power of making ordinances to the provincial council."

" 86. Any ordinance made by a provincial council shall have effect in and for the province as long and as far only as it is not repugnant to any Act of Parliament."

*Effect of provincial ordinances.*

" 87. A provincial council may recommend to Parliament the passing of any law relating to any matter in respect of which such council is not competent to make ordinances."

*Recommendations to Parliament.*

" 88. In regard to any matter which require to be dealt with by means of a private Act of

Parliament, the provincial Council of the province to which the matter relates, may, subject to such procedure as shall be laid down by Parliament, take evidence by means of a Select Committee or otherwise for and against the passing of such law, and, upon receipt of a report from such council, together with the evidence upon which it is founded, Parliament may pass such act without further evidence being taken in support thereof."

*Power to deal with matters proper to be dealt with by private Bill Legislation.*

" 90. When a proposed ordinance has been passed by a provincial Council it shall be presented by the administrator to the Governor General in Council for his assent. The

*Assent to provincial ordinances.*

Governor General in Council shall declare within one month from the presentation to him of the proposed ordinance that he assents thereto, or that he withholds assent, or that he reserves the proposed ordinance for further consideration. A proposed ordinance so reserved shall not have any force unless and until, within one year from the day on which it was presented to the Governor General in Council, he makes known by proclamation that it has received his assent."

“ 92. (1) In each province there shall be an auditor of accounts to be appointed by the Governor General in Council.

*Audit of provincial accounts.*

(2) No such auditor shall be removed from office except by the Governor General in Council for cause assigned, which shall be communicated by message to both houses of Parliament within one week after the removal, if Parliament be then sitting, and, if Parliament be not sitting, then within one week after the commencement of the next ensuing session.

(3) Each such auditor shall receive out of the consolidated Revenue Fund such salary as the Governor General in Council, with the approval of Parliament, shall determine.

(4) Each such auditor shall examine and audit the accounts of the province to which he is assigned subject to such regulations and orders as may be framed by the Governor General in Council and approved by Parliament, and no warrant signed by the administrator authorizing the issuing of money shall have effect unless countersigned by such auditor. ”

These provisions reveal the thoroughness with which the four Colonies of 1908 suppressed their local particularism and thus contributed to make a powerful Union. *The forces that made the Union.* The provinces as now constituted are in fact bound hand and foot to the chariot wheels of the Union ; and there is hardly a vocal section of public opinion throughout South Africa which does not now heartily endorse the fundamental principles of the South Africa Act. Here, as in practically all other cases, the evils of disunion combined with the fear of attack from without and the disruptive force of racial tension within, both between Dutch and English and between white and black, to unite those who had been far apart.

There are some features in the Constitution which may be called federal. *Federal features.* There is, for instance, the Supreme Court set up by section 95 as follows :—

“ 95. There shall be a Supreme Court of South Africa consisting of a Chief Justice of South Africa, the ordinary judges of appeal, and the other judges of the several divisions of the Supreme Court of South Africa in the provinces.”

The Supreme Court is a federal institution in the sense that it has jurisdiction in judicial disputes between the provinces; but it is not a truly federal Supreme Court inasmuch as it does not possess the power, enjoyed by the Supreme Court of the United States, of declaring whether a given enactment comes within or without the four corners of the Constitution. Local autonomy in judicial administration has been provided under section 98 which runs as follows :—

” 98. (1) The several supreme courts of the Cape of Good Hope, Natal, and the *Constitution of provincial and local divisions of Supreme Court.* Transvaal and the High Court of the Orange River Colony shall, on the establishment of the Union, become provincial divisions of the Supreme Court of South Africa, within their respective provinces, and shall each be presided over by a judge-president.

(2) The court of the eastern districts of the Cape of Good Hope, the High Courts Griqualand, the High Court of Witwatersrand, and the several circuit courts, shall become local divisions of the Supreme Court of South Africa within the respec-



tive areas of their jurisdiction as existing at the establishment of the Union.

(3) The said provincial and local divisions, referred to in this Act as superior courts, shall in addition to any original jurisdiction exercised by the corresponding courts of the Colonies at the establishment of the Union, have jurisdiction in all matters—

(a) in which the Government of the Union or a person suing or being sued on behalf of such Government is a party :

(b) in which the validity of any provincial ordinance shall come into question.

(4) Unless and until Parliament shall otherwise provide, the said superior courts shall *mutatis mutandis* have the same jurisdiction in matters affecting the validity of elections of members of the House of Assembly and provincial councils as the corresponding courts of the Colonies have at the establishment of the Union in regard to parliamentary elections in such Colonies respectively.”

The original constitution of the Senate was laid down in section 24, which  
*The Senate a federal feature* says :—

“ 24. For ten years after the establishment of the Union the constitution of the Senate shall, in

respect of the original provinces, be as follows :—

- (i) Eight senators shall be nominated by the Governor General in Council, and for each original province eight senators shall be elected in the manner hereinafter provided :
- (ii) The senators to be nominated by the Governor General in Council shall hold their seats for ten years. One-half of their number shall be selected on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa. If the seat of a senator so nominated shall become vacant, the Governor General in Council shall nominate another person to be a senator, who shall hold his seat for ten years :
- (iii) After the passing of this Act, and before the day appointed for the establishment of the Union, the Governor of each of the Colonies shall summon a special sitting of both Houses of the Legislature, and the two Houses sitting together as one body

and presided over by the Speaker of the Legislative Assembly shall elect eight persons to be senators for the province. Such senators shall hold their seats for ten years. If the seat of a senator so elected shall become vacant, the provincial council of the province for which such senator has been elected shall choose a person to hold the seat until the completion of the period for which the person in whose stead he is elected would have held his seat."

" 25. Parliament may provide for the manner in which the Senate shall be constituted after the expiration of ten years, and  
*Subsequent consti-      the expiration of ten years, and*  
*tution of the Senate.      unless and until such provision*  
shall have been made—

- (i) the provisions of the last preceding section with regard to nominated senators shall continue to have effect ;
- (ii) eight senators for each province shall be elected by the members of the provincial council of such province together with the members of the House of Assembly elected for such province. Such senators

shall hold their seats for ten years unless the Senate be sooner dissolved. If the seat of an elected senator shall become vacant, the members of the provincial council of the province, together with the members of the House of Assembly elected for such province, shall choose a person to hold the seat until the completion of the period for which the person in whose stead he is elected would have held his seat. The Governor General in Council shall make regulations for the joint election of senators prescribed in this section."

As far as I have been able to ascertain, the South African Parliament has not taken action under section 25 and therefore the South African Senate remains as it began, a partially nominated, partially elected, Second Chamber deliberately designed to represent the interests of the provinces. We may take special note in passing of the provision whereby the eight elected Senators serving the interests of each province in the Senate are chosen by the members of the provincial council and not by the electorate at large.

An important provision governing the relations between the Government of the Union of South Africa and the provincial executive committees occurs in section 118, which runs as follows :—

*Commission of Inquiry into the financial relations between the Union and the provinces.*

“ 118. The Governor General in Council shall, as soon as may be after the establishment of the Union, appoint a commission, consisting of one representative from each province, and presided over by an officer from the Imperial Service, to institute an inquiry into the financial relations which should exist between the Union and the provinces. Pending the completion of that inquiry and until Parliament otherwise provides, there shall be paid annually out of the Consolidated Revenue Fund to the administrator of each province—

- (a) an amount equal to the sum provided in the estimates for education, other than higher education, in respect of the financial year, 1908-09, as voted by the Legislature of the corresponding colony during the year nineteen hundred and eight ;

- (b) such further sums as the Governor General in Council may consider necessary for the due performance of the services and duties assigned to the provinces respectively.

Until such inquiry shall be completed and Parliament shall have made other provision, the executive committees in the several provinces shall annually submit estimates of their expenditure for the approval of the Governor General in Council, and no expenditure shall be incurred by any executive committee which is not provided for in such approved estimates."

This section and the provisions relating to the character of the Senate as the representative of provincial interests were concessions by the Union Party sixteen years ago to the local autonomy protagonists chiefly from Natal. It is the kind of concession which naturally forms a part of any process whereby the relations between Central and Local Governments are redistributed.

Though there is no list of Central subjects, there is specific mention of one, namely the

means of communication represented by ports,

*Ports, harbours* harbours, and railways, in  
*and railways.* which the conflicting interests

of the four separate Administrations existing before 1909 had seriously hampered the development of South Africa. One of Lord Milner's last public statements before leaving South Africa in 1905 was made at a Conference in Johannesburg where he presided. "I should like to record as my parting words," said Lord Milner, "my conviction of the supreme importance of trying to get over the conflict of State interests in the matter of railways. I know it would be very difficult to adjust all interests, but, even if it took six months to arrive at an adjustment, it would be for all time. What impresses me is that almost every railway question which is brought forward, however trivial it may be, raises the whole controversy (*i.e.*, the conflicts between the four separate railway administrations), and the battle between conflicting interests has to be fought out over and over again on each occasion."

One further concession to local feeling may be noted in passing. Section 133 gives statutory

*Compensation to colonial capitals for diminution of prosperity.*

compensation to the dispossessed colonial capitals for the diminution of prosperity:—  
“In order to compensate Pietermaritzburg and Bloemfontein for any loss sustained by them in the form of diminution of prosperity or decreased rateable value by reason of their ceasing to be the seats of government of their respective colonies, there shall be paid from the Consolidated Revenue Fund for a period not exceeding twenty-five years to the municipal councils of such towns a grant of two per centum per annum on their municipal debts, as existing on the thirty-first day of January nineteen hundred and nine, and as ascertained by the Controller and Auditor-General. The Commission appointed under section one hundred and eighteen shall, after due inquiry, report to the Governor General in Council what compensation should be paid to the municipal councils of Cape Town and Pretoria for the losses, if any, similarly sustained by them. Such compensation shall be paid out of the Consolidated Revenue Fund for a period not exceeding twenty-five years, and shall not exceed one per centum per annum on the respective municipal debts of such towns as existing



on the thirty-first January nineteen hundred and nine, and as ascertained by the Controller and Auditor General. For the purposes of this section Cape Town shall be deemed to include the municipalities of Cape Town, Green Point, and Sea Point, Woodstock, Mowbray, and Rondebosch, Claremont, and Wynberg, and any grant made to Cape Town shall be payable to the councils of such municipalities in proportion to their respective debts. One-half of any such grants shall be applied to the redemption of the municipal debts of such towns respectively. At any time after the tenth annual grant has been paid to any of such towns the Governor General in Council, with the approval of Parliament, may after due inquiry withdraw or reduce the grant to such town."

#### SWITZERLAND.

The Constitution of the Swiss Confederation declares in its first Article that :—

"The peoples of the twenty-two Sovereign Cantons of Switzerland united in the present alliance namely : Zurich, Berne, Lucerne, Uri, Schwyz, Unterwalden (Le Haut et le Bas), Glaris, Zoug,

Fribourg, Soleure, Bale (ville et campagne), Schaffhouse, Appenzell (les deux Rhodes), St. Gall, Grisons, Argovie, Thurgovie, Tessin, Vaud, Valais, Neuchâtel and Geneva compose together the Federation."

The Third Article further declares that "the Cantons are Sovereign in so far as their sovereignty is not limited by the Federal Constitution, and, as such they exercise all the rights not explicitly delegated to the Federal Power". Switzerland is thus the complete antithesis to South Africa, and although this article describes the Cantons as Sovereign, fundamentally the Swiss People is the Swiss Sovereign.

"The Swiss Federal Constitution," says Professor Dicey in his "Law of the Constitution," "may appear to a superficial observer to be a copy in miniature of the Constitution of the United States; and there is no doubt that the statesmen

*Professor Dicey's Account of the Principles of Swiss Federalism.* of 1848 did in one or two points, and notably in the formation of the Council of States or Senate, intentionally follow American precedents. But for all this, Swiss Federalism is the natural outgrowth of Swiss history, and

bears a peculiar character of its own that well repays careful study.

Three ideas underlie the institutions of modern *Three Ideas in* Switzerland. The first is the *Swiss Institutions.* uncontested and direct sovereignty of the nation.

The second idea to which Swiss institutions give expression is that politics are a matter of business. The system of Swiss Government is business-like. The affairs of the nation are transacted by men of capacity, who give effect to the will of the nation.

The last and most original Swiss conception is one which it is not easy for foreigners bred up under other constitutional systems to grasp. It is that the existence of political parties does not necessitate the adoption of party government.

Whatever may be the merits of Swiss institutions the idea which governs them is obvious. The nation is Monarchy, the Executive and the Members of the Legislature are the Peoples' agents or Ministers.

These are the principles or conceptions embodied in Swiss institutions; they are closely inter-connected, they pervade and to a great extent

explain the operation of the different parts of the Swiss Constitution. Many of its features are of course common to all federal governments, but its special characteristics are due to the predominance of the three ideas to which the reader's attention has been directed. That this is so will be seen if we examine the different parts of the Swiss Constitution.

I. *The Federal Council*.—This body, which we should in England call the Ministry, consists of seven persons elected at their first meeting by the two Chambers which make up the Swiss Federal Assembly or Congress, and for this purpose sit together. The Councillors hold office for three years, and being elected after the first meet-

*The Federal Executive.* ing of the Assembly, which itself is elected for three years, keep their places till the next Federal Assembly meets, when a new election takes place. The Councillors need not be, but in fact are, elected from among the members of the Federal Assembly, and though they lose their seats on election, yet, as they can take part in the debates of each House, may for practical purposes be considered members of the Assembly or Parliament. The powers confided to the Council are wide. The

Council is the Executive of the Confederacy and possesses the authority naturally belonging to the national government. It discharges also, strange as this may appear to Englishmen or Americans, many judicial functions. To the Council are in many cases referred questions of "administrative law," and also certain classes of what Englishmen or Americans consider strictly legal questions. Thus the Council in effect determined some years ago what were the rights as to meeting in public of the Salvation Army, and whether and to what extent Cantonal legislation could prohibit or regulate their meetings. The Council again gives the required sanction to the Constitutions or to alterations in the Constitutions of the Cantons, and determines whether clauses in such Constitutions are, or are not, inconsistent with the articles of the Federal Constitution. The Council is in fact the centre of the whole Swiss Federal system ; it is called upon to keep up good relations between the Cantons and the Federal or National government, and generally to provide for the preservation of order, and ultimately for the maintenance of the law throughout the whole country. All foreign affairs fall under the Council's supervision, and the conduct

of foreign relations must, under the circumstances of Switzerland, always form a most important and difficult part of the duties of the government.

Though the Councillors are elected they are not dismissible by the Assembly, and in so far the Council may be considered an independent body ; but from another point of view the Council has no independence. It is expected to carry out, and

*A Non-Party Cabinet.* does carry out, the policy of the Assembly, and ultimately the policy of the nation, just as a good man of business is expected to carry out the orders of his employer. Many matters which are practically determined by the Council might constitutionally be decided by the Assembly itself, which, however, as a rule leaves the transaction of affairs in the hands of the Council. But the Council makes reports to the Assembly and were the Assembly to express a distinct resolution on any subject, effect would be given to it. Nor is it expected that either the Council or individual Councillors should go out of office because proposals or laws presented by them to the Assembly are rejected, or because a law passed, with the approval of the Council, by the Chambers, is vetoed on being referred to the people. The

Council, further, though as the members thereof, being elected by the Federal Assembly, must in general agree with the sentiments of that body, does not represent a Parliamentary majority as does an English or a French Ministry. The Councillors, though elected for a term of three years are re-eligible, and as a rule are re-elected. The consequence is that a man may hold office for sixteen years or more, and that the character of the Council changes but slowly ; and there have, it is said, been cases in which the majority of the Parliament belonged to one party and the majority of the Council to another, and this want of harmony in general political views between the Parliament and the Government did not lead to inconvenience. In truth the Council is not a Cabinet but a Board for the management of business, of which Board the so-called President of the Confederation, who is annually elected from among the members of the Council, is merely the chairman. It may fairly be compared to a Board of Directors chosen by the members of a large joint-stock company. In one sense the Board has no independent power. The majority of the shareholders, did they choose to do so, could always control its action or reverse its policy. In

another sense as we all know, a Board is almost free from control. As long as things are well, or even tolerably, managed the shareholders have neither the wish nor practically the power to interfere. They know that the directors possess knowledge and experience which the shareholders lack, and that to interfere with the Board's management would imperil the welfare of the association. So it is with the Federal Council. Its dependence is the source of its strength. It does not come into conflict with the Assembly ; it therefore is a permanent body, which carries on, and carries on with marked success, the administration of public affairs. It is a body of men of business who transact the business of the State.

It is worth while to dwell at some length on the constitution and character of the Swiss Council or Board, because it gives us a kind of Executive differing both from the Cabinet government of England or France, and from the Presidential government of America. The Council does not, *Contrasts with like an English Cabinet, British and American present, at any rate directly practice. and immediately, a predominant political party.* It is not liable to be at any



moment dismissed from office. Its members keep their seats for a period longer than the time during which either an English Ministry or an American President can hope to retain office. But the Council, though differing greatly from a Cabinet, is a Parliamentary or semi-Parliamentary Executive. It has not, like an American President, an independent authority of its own which, being derived from popular election, may transcend, and even be opposed to, the authority of the Legislature. The constitutional history of Switzerland since 1848 has exhibited none of those conflicts between the Executive and the Legislative body which have occurred more than once in the United States. The position of the Council may, if we seek for an historical parallel, be compared with that of the Council of State under the Cromwellian Instrument of Government, and indeed occupies very nearly the position which the Council of State would have held had the Instrument of Government been, in accordance with the wishes of the Parliamentary Opposition, so modified as to allow of the frequent re-election by Parliament of the members of the Council. If we desire a modern parallel we may perhaps find it in the English Civil

Service. The members of the Council are, like the permanent heads of the English Government offices, officials who have a permanent tenure of office, who are in strictness the servants of the State, and who are expected to carry out, and do carry out, measures which they may not have framed, and the policies of which they may not approve. This comparison is the more instructive, because in the absence of an elaborate Civil Service the members of the Council do in effect discharge rather the duties of permanent civil servants than of ministers.

II. *The Federal Assembly.*—This Parliament is certainly modelled to a certain extent on the American Congress. For several purposes, however, the two chambers of which it consists sit together. As already pointed out, when thus

*The Swiss Federal* combined they elect the Federal Council or Ministry. The *Legislature.* Assembly, moreover, is, unlike any representative assembly to which the English people are accustomed, on certain administrative matters a final Court of Appeal from the Council. The main function, however, of the Assembly is to receive reports from the Council and to legislate. It sits but for a short period each year, and confines

itself pretty closely to the transaction of business. Laws passed by it may, when referred to the people, be vetoed. Its members are pretty constantly re-elected, and it is apparently one of the most orderly and business-like of Parliaments.

The Assembly consists of two chambers or houses.

The Council of States, or, as we may more conveniently call it, the Senate represents the Cantons, each of which as a rule sends two members to it.

The National Council, like the American House of Representatives directly represents the citizens. It varies in numbers with the growth of the population, and each Canton is represented in proportion to its population.

In one important respect the Federal Assembly differs from the American Congress. In the United States the Senate has hitherto been the more influential of the two Houses. In Switzerland the Council of States was expected by the founders of the Constitution to wield the sort of authority which belong to the American Senate. This expectation has been disappointed. The Council of States has played quite a second-

ary part in the working of the Constitution, and

*The failure of* possesses much less power than *the Second Chamber.* the National Council. The reasons given for this are various. The members of the Council are paid by the Cantons which they represent. The time for which they hold office is regulated by each Canton, and has generally been short. The Council has no special functions such as has the American Senate, and the general result has been that leading statesmen have sought for seats not in the Council of States, but in the National Council. One cause of the failure on the part of the Council of States to fulfil the expectations of its creators seems to have escaped Swiss attention. The position and functions of the Federal Council or Ministry, its permanence and its relation to the Federal Parliament, make it impossible for the chamber which represents the Cantons to fill the place which is occupied in America by the House which represents the States. The inferior position of the Swiss Council of States deserves notice. It is one of the parts of the Constitution which was suggested by the experience of a foreign country, and for this very reason has, it may be suspected, not fitted in with the native institutions of Switzerland.

III. *The Federal Tribunal*.—This Court was constituted by statesmen who knew the weight and authority which belongs to the Supreme Court of the United States; but the Federal Tribunal was from the beginning, and is still, a

*The Federal Judiciary.* very different body from, and a much less powerful body than the American Supreme Court. It is composed of fourteen judges, and as many substitutes elected for six years by the Federal Assembly, which also designates the President and the Vice-President of the Court for two years at a time. It possesses criminal jurisdiction in cases of high treason, and in regard to what we may term high crimes and misdemeanours, though its powers as a criminal Court are rarely put into operation. It has jurisdiction as regards suits between the Confederation and the Cantons, and between the Cantons themselves, and generally in all suits in which the Confederation or a Canton is a party. It also determines all matters of public law, and has by degrees, in consequence of federal legislation, been made virtually a general Court of Appeal from the Cantonal tribunals in all cases arising under federal laws where the amount in dispute

exceeds 3,000 francs. Add to this that the Court entertains complaints of the violation of the constitutional rights of citizens, and this whether the right alleged to be violated is guaranteed by a Federal or by a Cantonal constitution. The primary object for which the Court was constituted was the giving of a decision or rather the making of judicial declarations where points of public law are in dispute ; and its civil jurisdiction has, under the stress of circumstances, been increased beyond the limits within which the founders of the Swiss Constitution intended it to be restrained. But the Federal Tribunal, though possessed of a wide and somewhat indefinite jurisdiction, wields nothing like the power possessed by the Supreme Court of the United States. It has no jurisdiction whatever in controversies with reference to "administrative law" ; these are reserved for the Federal Council, and ultimately for the Federal Assembly, and the term "administrative controversies" has been given a very extensive signification, so that the Court has been excluded "from the consideration of a long list of subjects, such as the right to carry on a trade, commercial treaties, consumption taxes, game laws, certificates of professional

capacity, factory acts, bank-notes, weights and measures, primary public schools, sanitary police and the validity of cantonal elections", which would *primâ facie* seem to fall within its competence. The tribunal, moreover, though it can treat cantonal laws as unconstitutional, and therefore invalid, is bound by the Constitution to treat all federal legislation as valid.

The judges of the Federal Tribunal are appointed by the Federal Assembly, and for short terms. The tribunal stands alone, instead

*Federal Decisions* of being at the head of a  
*executed by the* national judicial system. It  
*Cantons.*

has further no officials of its own for the enforcement of its judgments. They are executed primarily by the cantonal authorities, and ultimately, if the cantonal authorities fail in their duty, by the Federal Council. The control, moreover, exerted by the Federal Tribunal over the Acts of Federal officials is incomplete. Any citizen may sue an official, but as already pointed out, administrative controversies are excluded from the courts' jurisdiction, and in case there is a conflict of jurisdiction, between the Federal Council and the Federal Tribunal, it is decided not by the Court

but by the Federal Assembly, which one would expect to support the authority of the Council. The Federal Tribunal, at any rate, cannot as regards such disputes fix the limits of its own competence. Under these circumstances it is not surprising that the Tribunal exercises less authority than the Supreme Court of the United States. What may excite some surprise is that, from the very nature of federalism the jurisdiction of the Federal Tribunal has, in spite of all disadvantages under which the Court suffers, year by year increased. Thus until 1893 questions relating to religious liberty, and the rights of different sects, were reserved for the decision of the Federal Assembly. Since that date they have been transferred to the jurisdiction of the Federal Tribunal.\* This very transfer, and the whole relation of the Tribunal, the Council, and the Assembly respectively, to questions which would in England or the United States be necessarily decided by a law court, serve to remind the reader of the imperfect recognition in Switzerland of the "rule of law", as it is understood in England, and of the separation of powers as that doctrine is understood in many continental countries.



IV. *The Referendum*.—If in the constitution of the Federal Tribunal and of the Council of States we can trace the influence of American examples, the referendum, as it exists in Switzerland, is an institution of native growth, which has received there a far more complete and extensive develop-

ment than in any other country. If we omit all details, and deal with the referendum as it in fact exists under the Swiss Federal Constitution, we may describe it as an arrangement by which no alteration or amendment on the Constitution, and no federal law which any large number of Swiss citizens think of importance, comes finally into force until it has been submitted to the vote of the citizens, and has been sanctioned by a majority of the citizens who actually vote. It may be added that a change in the Constitution thus referred to the people for sanction cannot come into force unless it is approved of both by a majority of the citizens who vote, and by a majority of the Cantons. It must further be noted that the referendum in different forms exists in all but one of the Swiss Cantons, and may therefore now be considered an essential feature of Swiss constitutionalism. The referendum is therefore

in effect a nation's veto. It gives to the citizens of Switzerland exactly that power of arresting legislation which is still in theory and was in the time, for example, of Elizabeth actually possessed by an English monarch. A Bill could not finally become a law until it had obtained the consent of the Crown. In popular language, the Crown, in case the monarch dissented, might be said to veto the Bill. A more accurate way of describing the Crown's action is to say that the King threw out or rejected the Bill just as did the House of Lords or the House of Commons when either body refused to pass a Bill. This is in substance the position occupied by the citizens of Switzerland when a law passed by the Federal Assembly is submitted to them for their approbation or rejection. If they give their assent it becomes the law of the land; if they refuse their assent it is vetoed, or, speaking more accurately, the proposed law is not allowed to pass, *i.e.*, to become in reality a law.

The referendum has a purely negative effect. It is in many of the Cantonal Constitutions, and in the Federal Constitution to a certain extent, supplemented by what is called the Initiative, that is, a device by which a certain number of citizens

can propose a law and require a popular vote upon it in spite of the refusal of the legislature to adopt their views. The Initiative has, under the Federal Constitution at any rate, received as yet but little trial. Whether it can be under any circumstances a successful mode of legislation may be doubted. All that need here be noted is that while the introduction of the Initiative is neither in theory nor in fact a necessary consequence of the maintenance of the referendum, both institutions are examples of the way in which in Switzerland the citizens take a direct part in legislation.

The referendum, taken in combination with the other provisions of the Constitution, and with the general character of Swiss federalism, tends, it is conceived, to produce two effects.

It alters, in the first place, the position both of the Legislature and of the Executive. The Assembly and the Federal Council become obviously the agents of the Swiss people. This state of things, while it decreases the power, may also increase the freedom of Swiss statesmen. A member of the Council, or the Council itself, proposes a law which is passed by the Legislature. It is, we will suppose, as has often

happened, referred to the people for approval and then rejected. The Council and the Assembly bow without any discredit to the popular decision. There is no reason why the members either of the Council or of the Legislature should resign their seats ; it has frequently happened that the electors, whilst disapproving of certain laws submitted for their acceptance by the Federal Assembly, have re-elected the very men whose legislation they have refused to accept. Individual politicians, on the other hand, who advocate particular measures just because the failure to pass these measures into law does not involve resignation or expulsion from office, can openly express their political views even if these views differ from the opinions of the people. The referendum, in the second place, discourages the growth of party government. The electors do not feel it necessary that the Council, or even the Assembly, should strictly represent one party. Where the citizens themselves can veto legislation which they disapprove, it matters comparatively little that some of their representatives should entertain political opinions which do not at the moment commend themselves to the majority of the electorate. The habit, moreover, acquired of taking part in legislation

must probably accustom Swiss citizens to consider any proposed law more or less on its merits. They are at any rate less prone than are the voters of most countries to support a party programme which possibly does not as to every one of its provisions command the assent of any one voter. It may, of course, on the other hand be maintained that it is the incomplete development of party government in Switzerland which favours the adoption of the referendum. However this may be, there can be little doubt that the existence of the most peculiar of Swiss institutions has a close connection with the condition of Swiss parties.

Swiss Federalism has been, as we have already pointed out, considerably influenced by American Federalism, and it is almost impossible for an intelligent student not to compare the most successful federal and democratic government of the New World with the most successful federal and democratic government of Europe, for the history and the institutions of America and of Switzerland exhibit just that kind of likeness and unlikeness which excites comparison.

The United States and Switzerland are both by nature Federations; neither country could,

*Switzerland and America.* it is pretty clear, prosper under any but a federal constitution ; both countries are, at the present day at any rate, by nature democracies. In each country the States or Cantons have existed before the federation. In each country state patriotism was originally a far stronger sentiment than the feeling of national unity. In America and in Switzerland national unity has been the growth of necessity. It is also probable that the sentiment of national unity, now that it has been once evoked, will in the long run triumph over the feeling of State rights or State sovereignty. In a very rough manner, moreover, there is a certain likeness between what may be called the federal history of both countries. In America and in Switzerland there existed for a long time causes which prevented and threatened finally to arrest the progress towards national unity. Slavery played in the United States a part which resembled at any rate the part played in Swiss history by religious decisions. In America and in Switzerland a less progressive, but united and warlike, minority of States held for a long time in check the influence of the richer, the more civilised, and the less united States. Constant disputes as to the area of slavery bore at any rate an

analogy to the dispute about the common territories which at one time divided the Catholic and Protestant Cantons. Secessions was anticipated by the Sonderbund, and the triumph of Grant was not more complete than the triumph of Dufour. Nor is it at all certain that the military genius of the American was greater than the military genius of the Swiss general. The War of Secession and the War of the Sonderbund had this further quality in common. They each absolutely concluded the controversies out of which they had risen; they each so ended that victor and vanquished alike soon became the loyal citizens of the same Republic. Each country, lastly, may attribute its prosperity, with plausibility at least, to its institutions and these institutions bear in their general features a marked similarity.

The unlikeness, however, between American and Swiss Federalism is at least as remarkable as the likeness. America is the largest as Switzerland is the smallest of Confederations; more than one American State exceeds in size and population the whole of the Swiss Confederacy. The American Union is from every point of view a modern state; the heroic age of Switzerland, as far as military glory is concerned, had closed before a single European had set foot in America,

and the independence of Switzerland was acknowledged by Europe more than a century before the United States began their political existence. American institutions are the direct outgrowth of English ideas, and in the main of the English ideas which prevailed in England during the democratic movement of the seventeenth century; American society was never under the influence of feudalism. The democracy of Switzerland is imbued in many respects with continental ideas of government, and till the time of the great French Revolution, Swiss society was filled with inequalities originating in feudal ideas. The United States is made up of States which have always been used to representative institutions; the Cantons of Switzerland have been mainly accustomed to non-representative, aristocratic or democratic government. Under these circumstances, it is naturally to be expected that even institutions which possess a certain formal similarity should display an essentially different character in countries which differ so widely as the United States and Switzerland.

These differences may be thus roughly summed up; American Federalism is strong where Swiss



Federalism is weak ; where American Federalism is weak, Swiss Federalism is strong.

The Senate and the Judiciary of the United States have rightly excited more admiration than any other part of the American Constitution. They have each been, to a certain extent, imitated by the founders of the existing Swiss Republic. But in neither instance has the imitation been a complete success. The Council of States has not the authority of the Senate ; the Federal Tribunal, though its power appears to be on the increase, cannot stand comparison with the Supreme Court. The judicial arrangements of Switzerland would appear, at any rate to a foreign critic, to be the least satisfactory of Swiss institutions, and the exercise by the Federal Council and the Federal Assembly of judicial powers is not in unison with the best modern ideas as to the due administration of justice.

#### IMPERIAL GERMANY.

“ The Constitution of the German Empire,” says Professor Dicey in his *The Law of the Constitution*, “ is too full of anomalies springing both from historical and from temporary causes to be

*Napoleon and the Beginnings of German Federalism.* taken as a fair representative of any known form of Government." It bears the marks of the manner in which Prussia grew to strength and in which she played the leading part in creating the Empire itself, Prussia in particular, and Germany in general, were taught the lesson of national unity by Napoleon. Napoleon's policy in the creation of the Confederation of the Rhine was designed to create a new political constellation in Germany which, animated as he thought, by hostility to Prussia would look towards France with a friendly eye. In fact, as it turned out, his estimate of the prevailing forces in Germany was erroneous, and all he succeeded in doing was to teach the members of the Confederation some of the benefits of common action as well as some experience in administration on a larger scale than that of any one of the petty component states.

A similar Confederation was established by the Treaty of Vienna after 1815 with a Diet composed of instructed delegates from each of the Member States. "The only organ of the Confederation was a Diet composed of the diplomatic agents of the different states, who acted

*The Diet of the Germanic Confederation after 1815.* like ambassadors, and voted in accordance with the instructions they received from their respective governments.

It had power to declare war and make peace, to organise the federal army, to enact laws for the purpose of applying the constitution, and to decide disputes between the States; but it had no administrative officers under its command, the federal laws being executed entirely by the officials of the States. Hence the only means of getting its orders carried out in case a State refused to obey them was by the process known as federal execution, which meant that the Diet called on one or more members of the Confederation to attack the recalcitrant State, and by invading its territories to compel submission."

The Imperial Constitution adopted in 1871 still described the Empire as a Confederation, but, as pointed out above, it represented a peculiar hybrid in Constitutions with its federal features sufficiently marked to justify its inclusion in this monograph. The Consti-

*German Imperial Constitution, a picture of Legislative Centralisation and Executive decentralisation.*

tution of the German Empire opens with the following preamble:—

“His Majesty the King of Prussia in the

*The Preamble of  
the Constitution of  
the German Empire.*

name of the North  
German Confedera-  
tion, His Majesty the  
King of Bavaria,  
His Majesty the King of Wurtem-  
berg, His Royal Highness the Grand  
Duke of Baden, and His Royal Highness  
the Grand Duke of Hesse and by  
Rhine, for those parts of the Grand  
Duchy of Hesse which are south of the  
river Main, conclude an everlasting Con-  
federation for the protection of the ter-  
ritory of the Confederation and the  
rights thereof, as well as to care for the  
welfare of the German people. This Con-  
federation will bear the name “German  
Empire” and is to have the following  
Constitution.

The residue of power under the German Im-

*The residue of* perial Constitution rested with  
*power.* the States, which possessed  
the right of direct taxation  
(a right now forfeited under the Republican

Constitution), but the allotment of subjects to the Imperial Legislature was so generous as to give the German Imperial Government and Legislature a scope considerably wider than that allotted to the Federal Government and Congress in America, for instance. Where the German Imperial Constitution failed to embody one of the most important features of a successful federal system lay in the fact that the executive agents of Imperial legislation were usually the officials of the States and not of the Empire. This is what President Lowell means when he says that the German Constitution presented a picture of "legislative centralisation and administrative decentralisation."

Sovereignty in certain respects in Imperial Germany remained with the Sovereign Heads of the component States, and in other respects passed to the Kaiser, the Bundesrat, and the Reichstag. It is noteworthy that, in spite of the personal Imperial control of the Army and Navy, the title of the Head of the State was deliberately chosen to show that he was but *primus inter pares* of the Crowned Heads of Germany. The kings and princelings who signed

the German Constitution in 1871 deliberately refused William I the title of Emperor of Germany and called him German Emperor instead : a distinction without a difference to the layman, but a distinction conveying a very substantial difference to those who insisted upon it. Both in legislation and in executive action the sovereignty of the Empire was mainly exercised through the Bundesrat (Federal Council), the Second Chamber which represented the States of the Empire and exercised large powers.

The position occupied by the German Emperor under the German Constitution as President of the Confederation is described in Chapter 4, Articles XI to XIX, which run as follows :—

*The position of the German Emperor as President of the Confederation.*

#### “ 4. *The Presidency.*

XI. The Presidency of the Confederation belongs to the King of Prussia, who bears the name of German Emperor. The Emperor has to represent the Empire internationally, to declare war, and to conclude peace in the name of the Empire, to enter into alliances and other Treaties with Foreign Powers, to accredit and to receive Ambassadors.

The consent of the Council of the Confederation is necessary for the declaration of war in the name of the Empire, unless an attack on the territory or the coast of the Confederation has taken place.

In so far as Treaties with Foreign States have reference to affairs which, according to Article IV, belong to the jurisdiction of the Imperial Legislature, the consent of the Council of the Confederation is requisite for their conclusion, and the sanction of the Imperial Diet for their coming into force.

XII. The Emperor has the right to summon, to open, to prorogue, and to close both the Council of the Confederation and the Imperial Diet.

XIII. The summoning of the Council of the Confederation, and of the Imperial Diet, takes place once each year, and the Council of the Confederation can be called together for preparation of business without the Imperial Diet being likewise summoned, whereas the latter cannot be summoned without the Council of the Confederation.

XIV. The Council of the Confederation must be summoned whenever one-third of the votes require it.

XV. The presidency in the Council of the Confederation and the direction of the business belong

to the Chancellor of the Empire, who is to be appointed by the Emperor.

The Chancellor of the Empire can be represented, on his giving written information thereof, by any other member of the Council of the Confederation.

XVI. The requisite motions, in accordance with the votes of the Council of the Confederation will be brought before the Imperial Diet in the name of the Emperor, where they will be supported by members of the Council of the Confederation, or by particular commissioners nominated by the latter.

XVII. The formulation and proclamation of the laws of the Empire, and the care of their execution, belongs to the Emperor. The Orders and Decrees of the Emperor are issued in the name of the Empire and require for their validity the counter-signature of the Chancellor of the Empire, who thereby undertakes the responsibility.

XVIII. The Emperor nominates the Imperial officials, receives their oath of allegiance to the Empire, and, when necessary, decrees their dismissal.

The officials of any State of the Confederation, when appointed to any Imperial office, are entitled



to the same rights with respect to the Empire, as they would enjoy from their official position in their own state, excepting in such cases as have otherwise been provided for by Imperial legislation before their entrance into the Imperial service.

XIX. Whenever members of the Confederation do not fulfil their Constitutional duties towards the Confederation, they may be constrained to do so by way of execution. Such execution must be decreed by the Council of the Confederation, and be carried out by the Emperor."

*Sphere of Imperial legislation.*

Article II, Section 2 of the Constitution, declares that:—

"II. Within this confederate territory the Empire exercises the right of legislation according to the tenour of this Constitution, and with the effect that the Imperial laws take precedence of the laws of the States. The Imperial laws receive their binding power by their publication in the name of the Empire, which takes place by means of an Imperial Law Gazette. If the date of its first coming into force is not otherwise fixed in the published law, it comes

into force on the 14th day after the close of the day on which the part of the Imperial Law Gazette which contains it is published at Berlin."

And Article IV recites the subjects allotted to the Imperial Legislature :—

"IV. The following affairs are subject to the superintendence and legislation of the Empire :--

1. The regulations as to freedom of translocation, domicile and settlement affairs, right of citizenship, passport and police regulations for strangers, and as to transacting business including insurance affairs in so far as these objects are not already provided for by Article III of this Constitution. In Bavaria, however, the domicile and settlement affairs, and likewise the affairs of colonization and emigration to foreign countries are herefrom excluded.
2. The customs and commercial legislation and the taxes which are to be applied to the requirements of the Empire.
3. The regulation of the system of the coinage, weights and measures, likewise

the establishment of the principles for the issue of funded and unfunded paper money ;

4. The general regulations as to banking ;
5. The granting of patents for inventions ;
6. The protection of intellectual property ;
7. The organization of the common protection of German commerce in foreign countries, of German vessels and their flags at sea, and the arrangement of a common Consular representation, which is to be salaried by the Empire ;
8. Railway affairs—excepting in Bavaria the arrangements in Article XLVI—and the construction of land and water communications for the defence of the country and for the general intercourse ;
9. The rafting and navigation affairs on waterways belonging in common to several of the States, and the condition of the waterways, and likewise the river or other water dues ;
10. Postal and telegraph affairs ; in Bavaria and Wurtemberg, however, only with

reference to the provisions of Article LII ;

11. Regulations as to the reciprocal execution of judgments in civil affairs and the settlement of requisitions in general ;
12. Likewise as to the verification of public documents ;
13. The general legislation as to obligatory rights, penal law, commercial and bill-of-exchange laws, and judicial procedure ;
14. The military and naval affairs of the Empire ;
15. The measures of medical and veterinary police ;
16. The regulations for the press and the right of association. ”

#### REPUBLICAN GERMANY.

“ It would be difficult ” says Professor Beard of Yale University, “ to imagine anything more illuminating than a comparison of the Constitution of the United States drawn up, in 1787, the fundamental law o

*The novelty of the German Republican Constitution.*

the Australian Commonwealth adopted in 1900, and the new German *Reichsverfassung* of 1919, which vibrates with the tramp of the proletariat. In the attempt of the Germans to combine the strength of Hamilton's government with the democratic control so vaunted by Jefferson we have an experiment that ought to stir our deepest interest. In the provisions for social, not to say socialistic, enterprise, both the Australian and the German constitutions offer noteworthy contrasts to our own fundamental law.... No sophisticated person will ever imagine (whatever he may say) that the German fundamental law was drawn from abstract political thinking, theories about the rights of states, or reflections on the fate of Greek democracies and ancient Rome. The pressure of class interests is evident in almost every line. If one should underscore the socialist sections with red, the centre clauses with yellow, and the capitalist phrases with black, one would have an interesting study in constitutional artistry."

The Constitution of the German Republic,  
*An experiment in economic federalism.* therefore, presents certain novel features; and, if it carries still

further the process by which the Reich under the former Imperial Constitution had steadily encroached on the domain of the individual States, it introduces institutions never before recognised in a constitutional document.

The novelty appears in the fact that the Constitution recognises interests other than those territorial and electoral units which are usually the exclusive basis of representation in other countries. The National Workers' Council is one of the instruments of the Constitution and possesses the right of consultation with the National Government in all legislative proposals dealing with "social and economic policy" (see Article 165, page 93). Tentative experiments of this kind have been made in other European countries in recent years, but in none of them has the economic life of the nation found an embodiment so revolutionary in the Articles of a National Constitution. Thus, with the Local Workers' Councils federated under the National Workers' Council, and with the National Workers' Council playing an explicitly constitutional part in the process of legislation, there is a kind of economic federalism in operation within the framework of the National Government.

The idea underlying this experiment is capable of employment in other forms. *Can the new German device be employed in India.* The creation of electorates other than territorial is already a feature of the Government of India Act; and the provision for the circulation of an Indian Bill in order to elicit opinion thereon *before* it is considered by the Legislature may be said to spring from the same origin as the new German device. Whether it can be usefully extended by the creation of specially recognised bodies to represent such special interests as exist in India is a matter for mature consideration.

We have seen already that Imperial Germany departed from the usual federal form in several ways, notably by the concessions in Railways, Posts, Telegraphs, and the Army to certain States and to Bavaria in particular. *Republican Germany more unitary and centralised than Imperial Germany.* At the same time, though Bismarck was forced to buy South German support for the Empire in 1871 by concessions which he disliked, none the less the general trend both of the Constitution itself and of the practice of German politics for the next forty years was that of an encroachment by the Reich upon the German States

The course of Imperial legislation was one of the principal manifestations of this encroachment. Even in finance the apparently protected liberty of the individual States became more and more limited ; and, while it is true that they conserved their autonomy in respect of duties and taxes, the benefit of the discovery of new sources of taxation almost invariably accrued to the Reich and the more the Reich discovered such new sources the more its legislation imposed on the several States the increasing task of collection. Thus in reality the financial scope of the States was narrowed and their dependency on the Reich increased.

When this Constitution broke under the pressure of defeat, the first instinct of the German people was to forsake Prussia to whom they attributed their downfall. For several months after the Armistice a powerful centrifugal movement swept through Germany, and there was a serious risk that the unity of the Empire, so painfully achieved during the first three quarters of the Nineteenth Century, would vanish. "The masses of the people saw in the Reich nothing more than an alliance of princes and Prussian domination. It was to the princes and to Prussia that they



attributed the inexpressible fault of having begun the war and lost it. During several weeks of limitless despair, two cries were raised, "Down with the Princes!" and above that, "Separation from Prussia!" It must be added that behind these cries was partly the unavowed hope that by abandoning the Reich one could more or less escape the menacing consequences of defeat. The Reich seemed on the point of dissolution."

Far-seeing men, however, realised that, if united Germany, whether Republican or Monarchic, were allowed to dissolve, the German citizen would be a homeless wanderer on the face of the earth without habitation or allegiance. Moreover, the shrewdest of those who inherited the reins of power from the Kaiser quickly understood that it would be more difficult to federate a group of sovereign or semi-sovereign republics, *e.g.*, Prussia, Saxony, Bavaria, and perhaps even Austria, than to establish outright a new German Republican State on a virtually unitary basis. Professor Preuss, who was the Minister of the Interior in the Scheidemann Cabinet of February 1919, early convinced himself that, unless the particularism of the indivi-

dual German States was killed at a blow, it would arise once more to break German unity. It is curious that, while the world in general was mainly concerned with semi-Bolshevik events in Bavaria, the makers of the German Republican Constitution were almost wholly preoccupied with the position of Prussia in the new Republic. There had been such a disproportion of power between Prussia and the other States under the Empire that the increase in the power of the Reich in those days inevitably meant an increase in Prussian power, until Prussia finally became almost synonymous with Germany—a condition described in the favourite catchword of modern German historians, "Preussen-Deutschland". The Republicans of 1919 were thus confronted with the problem of creating a new centralised German State without still further increasing the domination of Prussia. When Professor Preuss as Under Secretary of State was entrusted with the task of drafting the Constitution he put the dilemma thus to his more intimate colleagues:—  
"Either Prussia as it was would have to be accepted by the Reich, in which case the German Republic would in reality become a unitary Prussian Republic with the non-Prussian parties

subjected to the will of Prussia: Or, if this conclusion was to be avoided and if a substantially unitary State with an effective will of its own was to be the aim of the Constitution, Prussia would have to be suppressed either by a partition of her territories by her own accord or by a less palatable partition imposed by the will of Germany as a whole." Professor Preuss deliberately chose the latter alternative in presenting the Constitution to the Scheidemann Government.

Naturally, the proposal to permit a section of Prussian territory to break away from the State and become a more or less self-contained unit, aroused violent opposition. In the plenary sessions of the Assembly the representatives of Eastern Prussia, that is to say, true Prussia, offered an unwavering resistance to the proposals made from time to time for the creation of a Republic of the West, comprising the Rhineland, Westphalia, and the territories of Oldenburg and Bremen. In another demand which came from the representatives of Hanover, the wheel of historical irony came full circle, for here a German Hanoverian group demanded "a free Hanover within a new Germany" to reverse the

*The Compromise  
of June 5.*

unjust annexation of 1866. The true Prussians from the East characteristically retorted to these proposals that the Separatists were rats deserting a sinking ship; and the manner of their defence lost nothing in arrogance nor perhaps, it must be admitted, in historical truth. From early spring to midsummer the controversy raged in Germany. On June 5th, a compromise was reached, which became the basis of Articles 2 and 18 of the Constitution finally adopted on August 11th of that year. The more extreme proposals of dismemberment, in the form of the new Rhineland or the new Hanover, were rejected; but the sword of Damocles was suspended over the head of Prussia in the provision that, after the lapse of a certain time, if a plebiscite taken in any region revealed the determination of the people by a sufficient majority to secede from one State, to join another or to become a separate unit in the German Republic, the National Assembly might pass a law to make effective the will of the people thus expressed. The agreement upon which these two Articles were based also contained the specific provision that no territorial change could be effected against the will of a State until at least two years had elapsed after the formal ratification of the Constitution.

The German Republican Constitution is too elaborate to be examined in detail. At first sight, it appears to follow the lines of its predecessor, and indeed Articles 6, 7, and 9 present no departure in principle from their companion Articles in the Imperial Constitution. Inasmuch, however, as the organisation for national defence is a matter for the exclusive jurisdiction of the National Government, the German Republic stands in a stronger position over against a State such as Bavaria than did Imperial Germany; and further the centralisation of railroads, posts and telegraphs, and waterways, again increases the strength of the Central Government in a matter in which the Imperial Constitution was weak.

One respect in which the centralisation of legislative power has proceeded much further in the German Republic than it did in the German Empire is to be found in the constantly recurring provision, in Article after Article, that "the Commonwealth may prescribe by law funda-

*The principles of public policy in nearly all important matters are laid down by national law, the details being left to legislation by the States.*

mental principles concerning. . . . . (Article 10),” or “details will be regulated by State laws in accordance with principles prescribed by National law (Article 146).”

The rubrics in the margin of the following Articles indicate at a glance the manner in which the scope of the German Republican Constitution extends beyond that of ordinary Constitutions, and as the rubrics with their accompanying Articles are for the most part self-explanatory, they require no further comment.

#### ARTICLE 1.

<i>The People is Sovereign.</i>	The German Commonwealth is a republic.
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Political authority is derived from the People.

#### ARTICLE 2.

<i>The territory of the Commonwealth.</i>	The territory of the Commonwealth consists of the territories of the German States. Other territories may be incorporated into the Commonwealth by National law, if their inhabitants, exercising the right of self-determination, so desire
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## ARTICLE 5.

Political authority is exercised in national affairs by the National Government in accordance with the Constitution of the Commonwealth, and in State affairs by the State Governments in accordance with the State constitutions.

## ARTICLE 6.

The Commonwealth has exclusive jurisdiction over :

1. Foreign relations ;
2. Colonial affairs ;
3. Citizenship, freedom of travel and residence, immigration and emigration, and extradition ;  
*Scope of exclusive national jurisdiction.*
4. Organization for national defence ;
5. Coinage ;
6. Customs, including the consolidation of customs and trade districts and the free interchange of goods ;
7. Posts and telegraphs, including telephones.

## ARTICLE 7.

The Commonwealth has jurisdiction over :

1. Civil law ;
2. Criminal law ;
3. Judicial procedure, including penal administration, and  
*Other subjects of national legislation, in respect of some of which the States have concurrent powers.* official co-operation between the administrative authorities ;
4. Passports and the supervision of aliens ;
5. Poor relief and vagrancy ;
6. The press, associations and public meetings ;
7. Problems of population ; protection of maternity, infancy, childhood and adolescence ;
8. Public Health, veterinary practice, protection of plants from disease and pests ;
9. The rights of labour, social insurance, the protection of wage-earners and other employees and employment bureaus ;
10. The establishment of national organizations for vocational representation :



11. Provision for war-veterans and their surviving dependents ;
12. The law of expropriation ;
13. The socialization of natural resources and business enterprises, as well as the production, fabrication, distribution, and pricefixing of economic goods for the use of the community ;
14. Trade, weights and measures, the issue of paper money, banking, and stock and produce exchange ;
15. Commerce in foodstuffs and in other necessities of daily life, and in luxuries ;
16. Industry and mining ;
17. Insurance ;
18. Ocean navigation and deep-sea and coast fisheries ;
19. Railroads, internal navigation, communication by power-driven vehicles on land, on sea, and in the air ; the construction of highways, in so far as pertains to general intercommunications and the national defence ;
20. Theatres and cinematographs.

## ARTICLE 8. .

The Commonwealth also has jurisdiction over taxation and other sources of income, in so far as they may be claimed in whole or in part for its purposes. If the Commonwealth claims any source of

*National control  
of taxation.*

revenue which formerly belonged to the States, it must have consideration for the financial requirements of the States.

## ARTICLE 9.

Whenever it is necessary to establish uniform rules, the Commonwealth has jurisdiction over :

1. The promotion of social welfare ;
2. The protection of public order and safety.

## ARTICLE 10.

The Commonwealth may prescribe by law fundamental principles concerning :

1. The rights and duties of religious associations ;
2. Education, including higher education and

*National legisla- libraries for scientific  
tion lays down use ;  
principles, details  
left to the States.*

3. The law of officers of all public bodies ;
4. The land law, the distribution of land, settlements and homesteads, restrictions on landed property, housing, and the distribution of population ;
5. Disposal of the dead.

## ARTICLE 11.

The Commonwealth may prescribe by law fundamental principles concerning the validity and mode of collection of State taxes, in order to prevent :

1. Injury to the revenues or to the trade relations of the Commonwealth ;
  2. Double taxation ;
  3. The imposition of excessive burdens or burdens in restraint of trade on the use of the means and agencies of public communication ;
  4. Tax discriminations against the products of other States in favour of domestic products in interstate and local commerce ; or
  5. Export bounties ;
- or in order to protect important social interests.

## ARTICLE 12.

So long and in so far as the Commonwealth does not exercise its jurisdiction, such jurisdiction remains with the States. This does not apply in cases where the Commonwealth possesses exclusive jurisdiction.

The National Cabinet may object to State laws relating to the subjects of Article 7, Number *National legislation* 13, whenever the general welfare of the Commonwealth is affected thereby.

## ARTICLE 13.

The laws of the Commonwealth are supreme over the laws of the States which conflict with them.

If doubt arises, or difference of opinion, whether State legislation is in harmony with the law of the Commonwealth, the proper authorities of the Commonwealth or the central authorities of the States, in accordance with more specific provisions of a national law, may have recourse to the decision of a supreme judicial court of the Commonwealth.

## ARTICLE 14.

The laws of the Commonwealth will be executed  
*The States are the agents of national laws.* by the State authorities,  
unless otherwise provided by  
national law.

## ARTICLE 15.

The National Cabinet supervises the conduct of affairs over which the Commonwealth has jurisdiction.

In so far as the laws of the Commonwealth are to be carried into effect by the State authorities, the National Cabinet may issue general instructions. It has the power to send commis-  
*....under national instructions.* sioners to the central authorities of the States, and, with their consent, to the subordinate State authorities, in order to supervise the execution of national laws.

It is the duty of the State Cabinets, at the request of the National Cabinet, to correct any defects in the execution of the national laws. In case of dispute either the National Cabinet or that of the State may have recourse to the decision of the Supreme Judicial Court, unless another court is prescribed by national law.

## ARTICLE 16.

The officers directly charged with the administration of national affairs in any State shall, as a rule, be citizens of that State. The officers, employees and workmen of the national administration shall, if they so desire, be employed in the districts where they reside as far as is possible and not inconsistent with their training and with the requirements of the service.

## ARTICLE 17.

Every State must have a republican constitution. The representatives of the People must be elected by the universal, equal, direct and secret suffrage of all German citizens, both men and women, according to the principles of proportional representation. The State Cabinet shall

*The Republican* require the confidence of the  
*form is obligatory.* representatives of the People.

The principles in accordance with which the representatives of the People are chosen apply also to municipal elections; but by State law a residence qualification not exceeding one year of residence in the municipality may be imposed in such elections.

## ARTICLE 18.

The division of the Commonwealth into States shall serve the highest economic and cultural interests of the People after most thorough consideration of the wishes of the population affected. State boundaries may be altered and new States may be created within the Commonwealth by the process of constitutional amendment.

With the consent of the States directly affected it requires only an ordinary law of the Commonwealth.

An ordinary law of the Commonwealth will also suffice, if one of the States affected does not consent, provided that the change of boundaries or the creation of a new State is desired by the population concerned and is also required by the preponderant national interest.

The wishes of the population shall be ascertained by a referendum. The National Cabinet orders

*Territory may be taken from a State in certain circumstances.*

a referendum on demand of one-third of the inhabitants qualified to vote for the National Assembly in the territory to be cut off.

Three-fifths of the votes cast, but at least a majority of the qualified voters are required for the alteration of a boundary or the creation of a new State. Even if a separation of only a part of a Prussian administrative district, a Bavarian circle, or, in other States, a corresponding administrative district, is involved, the wishes of the population of the whole district must be ascertained. If there is no physical contact between the territory to be cut off and the rest of the district, the wishes of the population of the district to be cut off may be pronounced conclusive by a special law of the Commonwealth.

After the consent of the population has been ascertained the National Cabinet shall introduce into the National Assembly a Bill suitable for enactment.

If any controversy arises over the division of property in connection with such a union or separation, it will be determined upon complaint of either party by the Supreme Judicial Court of the German Commonwealth.

#### ARTICLE 19.

If controversies concerning the Constitution arise within a State in which there is no court



competent to dispose of them, or if controversies of a public nature arise between different States

*Disputes judicial- or between a State and the  
able by Supreme Commonwealth, they will be  
Court.*

determined upon complaint of one of the parties by the Supreme Judicial Court of the German Commonwealth, unless another judicial court of the Commonwealth is competent.

• The President of the Commonwealth executes judgments of the Supreme Judicial Court.

### SECTION III.

#### THE NATIONAL PRESIDENT AND THE NATIONAL CABINET.

\* \* \* \* \*

#### ARTICLE 48.

If any State does not perform the duties imposed upon it by the Constitution or by national laws, the National President may hold it to the performance thereof by force of arms.

If public safety and order in the German Commonwealth is materially disturbed or endangered, the National President may take the necessary measures to restore public safety and

order, and, if necessary, to intervene by force of arms. To this end he may temporarily suspend, in whole or in part, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124 and 153.

*Power of the National President to interfere in a State by force of arms.* The National President must immediately inform the National Assembly of all measures adopted by authority of paragraphs 1 or 2 of this Article. These measures shall be revoked at the demand of the National Assembly.

If there is danger from delay, the State Cabinet may for its own territory take provisional measures as specified in paragraph 2. These measures shall be revoked at the demand of the National President or of the National Assembly.

The details will be regulated by a national law.

\* \* \* \* \*

#### ARTICLE 60.

A National Council will be organized to represent the German States in national legislation and administration.

*The National Council represents the States.*

## ARTICLE 61.

In the National Council each State has at least one vote. In the case of the larger States one vote is accorded for every million inhabitants. Any excess equal at least to the population of the smallest State is reckoned as equivalent to a full million. No State shall be accredited with more than two-fifths of all votes.

The number of votes is determined anew by the National Council after every general census.

## ARTICLE 62.

In committees formed by the National Council from its own members no State will have more than one vote.

## ARTICLE 63.

The States will be represented in the National Council by members of their Cabinets. Half of the Prussian votes, however, will be at the disposal of the Prussian provincial administrations in accordance with a State law.

*The States represented in the National Council by their Governments.*

The States have the right to send as many representatives to the National Council as they have votes.

\* \* \* \* \*

#### ARTICLE 65.

The chairmanship of the National Council and of its committees is filled by a member of the National Cabinet. The members of the National Cabinet

*President of the* have the right and on request *National Council.* (of the National Council) the duty to take part in the proceedings of the National Council and its committees. They must at their request be heard at any time during its deliberations.

\* \* \* \* \*

#### ARTICLE 68.

Bills are introduced by the National Cabinet *National Legisla-* or by members of the *tion.* National Assembly.

National laws are enacted by the National Assembly.

## ARTICLE 69.

The introduction of bills by the National Cabinet requires the concurrence of the National Council. If an agreement between the National Cabinet and the National Council is not reached, the National Cabinet may nevertheless introduce the bill, but must state the dissent of the National Council.

If the National Council resolves upon a bill to which the National Cabinet does not assent, the latter must introduce the bill in the National Assembly together with a statement of its attitude.

\* \* \* \* \*

## ARTICLE 77.

The National Cabinet issues the general administrative regulations necessary for the execution of the national laws so far as the laws do not otherwise provide. It must secure the assent of the National Council if the execution of the national laws is assigned to the State authorities.

## ARTICLE 78.

The conduct of relations with foreign countries is exclusively a function of the Commonwealth.

The States, in matters subject to their jurisdiction, may conclude treaties with foreign countries ; such treaties require the assent of the Commonwealth.

Agreements with foreign countries regarding changes of national boundaries will be concluded by the Commonwealth with the consent of the State concerned. Changes of boundaries may be made only by authority of a national law, except in cases where a mere adjustment of the boundaries of uninhabited districts is in question.

To assure the representation of interests arising from the special economic relations of individual States to foreign countries or from their proximity to foreign countries, the Commonwealth determines the requisite arrangements and measures in agreement with the States concerned.

\* \* \* \*

#### ARTICLE 80.

Colonial policy is exclusively a function of the Commonwealth.

\* \* \* \*

## ARTICLE 82.

Germany forms a customs and trade area surrounded by a common customs boundary.

The customs boundary is identical with the international boundary. At the seacoast the shore of the mainland and of the island belonging to the national territory constitutes the customs boundary. Deviations may be made for the course of the customs boundary at the ocean and at other bodies of water.

*National scope  
in fiscal matters.*

Foreign territories or parts of territories may be incorporated in the customs area by international treaties or agreements.

Portions of territory may be excluded from the customs area in accordance with special requirements. In the case of free ports this exclusion may be discontinued only by an amendment to the Constitution.

Districts excluded from the customs area may be included within a foreign customs area by international treaties or agreements.

All products of nature or industry, as well as works of art, which are subjects of free commerce

within the Commonwealth, may be transported in any direction across State and municipal boundaries. Exceptions are permissible by authority of national law.

#### ARTICLE 83.

Customs duties and taxes on articles of consumption are administered by the national authorities.

In connection with national tax administration by the national authorities, arrangements shall be provided which will enable the States to protect their special agricultural, commercial, trade and industrial interests.

#### ARTICLE 84.

The Commonwealth has authority to regulate by law :

1. The organization of the State tax administration so far as is required for the uniform and impartial execution of the national tax laws ;
- 2 The organization and functions of the authorities charged with the supervision of the execution of the national tax laws ;
3. The accounting with the States ;



4. The reimbursement of the costs of administration in connection with the execution of the national tax laws.

#### ARTICLE 85.

All revenues and expenditures of the Commonwealth must be estimated for each fiscal year and entered in the budget.

The budget is adopted by law before the beginning of the fiscal year.

Appropriations are ordinarily granted for one year; in special cases they may be granted for a longer period. Otherwise, provisions extending beyond the fiscal year or not relating to the national revenues and expenditures or their administration, are inadmissible in the national budget law.

The National Assembly may not increase appropriations in the budget bill or insert new items without the consent of the National Council.

The consent of the National Council may be dispensed with in accordance with the provisions of Article 74.

\* \* \* \* \*

## ARTICLE 87.

Funds may be procured by borrowing only in case of extraordinary need and in general for expenditures for productive purposes only. Such procurement of funds as well as the assumption by the Commonwealth of any financial obligation is permissible only by authority of a national law.

## ARTICLE 88.

The postal and telegraph services, together with the telephone service, are exclusively functions of the Commonwealth.

The postage stamps are uniform for the whole Commonwealth.

The National Cabinet, with the consent of the National Council, issues the regulations prescribing the conditions and charges for the use of the means of communication. With the consent of the National Council it may delegate this authority to the Postmaster General.

*Posts and Telegraphs are a National concern.*

The National Cabinet, with the consent of the National Council, establishes an advisory council to co-operate in deliberations concerning the postal, telegraph and telephone services and rates.

The Commonwealth alone concludes treaties relating to communication with foreign countries.

#### ARTICLE 89.

It is the duty of the Commonwealth to acquire ownership of the railroads which serve as means of general public communication, and to operate them as a single system of transportation.

*Railways.*

The rights of the States to acquire private railroads shall be transferred to the Commonwealth on its demand.

\* \* \* \* \*

#### ARTICLE 94.

If the Commonwealth takes over the operation of railroads which serve as means of general public communication in any district, additional railroads to serve as means of general public communication within this district may only be built by the Commonwealth or with its consent. If new construction or the alteration of existing national railroad systems encroaches upon the sphere of authority of the State police, the national railroad administration, before its decision, shall grant a hearing to the State authorities.

*The States have certain limited rights in railways.*

Where the Commonwealth has not yet taken over the operation of the railroads, it may lay out on its own account by virtue of national law railroads deemed necessary to serve as means of general public communication or for the national defence, even against the opposition of the States, whose territory they will traverse, without, however, impairing the sovereign powers of the States, or it may turn over the construction to another to execute, together with a grant of the right of expropriation if necessary.

Each railroad administration must consent to connection with other roads at the expense of the latter.

\* \* \* \* \*

#### ARTICLE 97.

It is the duty of the Commonwealth to acquire ownership of and to operate all waterways serving as means of general public communication.

After they have been taken over, waterways serving as means of general public communication may be constructed or extended only by the Commonwealth or with its consent.

In the administration, development, or construction of such waterways the requirements of agriculture and water-supply shall be protected in agreement with the States. Their improvement shall also be considered.

Each waterways administration shall consent to connection with other inland waterways at the expense of the latter. The same obligation exists for the construction of a connection between inland waterways and railroads.

In taking over the waterways the Commonwealth acquires the right of expropriation, control of rates, and the police power over waterways and navigation.

The duties of the river improvement associations in relation to the development of natural waterways in the Rhine, Weser, and Elbe basins shall be assumed by the Commonwealth.

\* \* \* \* \*

## VII.

### ARTICLE 103.

Ordinary jurisdiction will be exercised by the National Judicial Court and the courts of the States.

\* \* \* \* \*

## ARTICLE 107.

There shall be administrative courts both in the Commonwealth and in the States, in accordance with the laws, to protect the individual against orders and decrees of administrative authorities.

*The Administration of Justice.*

## ARTICLE 108.

In accordance with a national law a Supreme Judicial Court will be established for the German Commonwealth.

## ARTICLE 110.

Citizenship in the Commonwealth and in the States will be acquired and lost in accordance with the provisions of a national law. Every citizen of a State is at the same time a citizen of the Commonwealth.

*Citizenship a National subject.*

Every German has the same rights and duties in each State of the Commonwealth as the citizens of that State.

## SECTION II.

## COMMUNITY LIFE.

## ARTICLE 128.

All citizens without distinction are eligible for public office in accordance with the laws and according to their ability and services.

All discriminations against women in the civil service are abolished.

The principles of the official relation shall be regulated by national law.

## ARTICLE 138.\*

State contributions to religious societies authorized by law, contract, or any special

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\* The above is to be read with Article 137, which runs as follows :—

## ARTICLE 137.

There is no State church.

Freedom of association in religious societies is guaranteed. The combination of religious societies within the Commonwealth is not subject to any limitations.

Every religious society regulates and administers its affairs independently within the limits of the general law. It appoints its officers without interference by the State or the civil municipality.

Religious societies may be incorporated in accordance with the general provisions of the civil law.

grant, will be commuted by State legislation. The general principles of such legislation will be defined by the Commonwealth.

The property of religious societies and unions and other rights to their cultural, educational, and charitable institutions, foundations, and other possessions are guaranteed.

*Disestablishment of the Church governed by National law, details of commutation, etc., left to the States.*

\* \* \* \* \*

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Existing religious societies remain, to the same extent as heretofore, public bodies corporate. The same rights shall be accorded to other religious societies if by their constitution and the number of their members they offer a guarantee of permanence. If a number of such public religious societies unite, this union is also a public body corporate.

The religious societies, which are recognised by law as bodies corporate, are entitled on the basis of the civil tax rolls to raise taxes according to the provisions of the laws of the respective States.

The associations, which have as their aim the cultivation of a system of ethics, have the same privileges as the religious societies.

The issuance of further regulations necessary for carrying out these provisions comes under the jurisdiction of the States.



## ARTICLE 143.

The education of the young shall be provided for through public institutions. In their establishment the Commonwealth, States and municipalities cooperate.

The training of teachers shall be regulated in *Education a con-* a uniform manner for the *current obligation.* Commonwealth according to the generally recognized principles of the higher education.

The teachers in the public schools have the rights and duties of State officers.

\* \* \* \* \*

## ARTICLE 146.

The public school system shall be systematically organized. Upon a foundation of common elementary schools the system of secondary and higher education is erected. The development of secondary and higher education shall be determined in accordance with the needs of all kinds of occupations, and the acceptance of a child in a particular school shall depend upon his qualifications and inclinations, not upon the economic and social position or the religion of his parents.

Nevertheless, within the municipalities, upon the petition of those entitled to instruction common schools shall be established of their faith or ethical system, in so far as this does not interfere with a system of school administration within the meaning of paragraph 1. The wishes of those entitled to instruction shall be considered as much as possible. Details will be regulated by State laws in accordance with principles to be prescribed by a national law.

To facilitate the attendance of those in poor circumstances at the secondary and higher schools, public assistance shall be provided by the Commonwealth, States, and municipalities, particularly, assistance to the parents of children regarded as qualified for training in the secondary and higher schools, until the completion of the training.

\* \* \* \*

#### ARTICLE 150.

The artistic, historical and natural monuments and scenery enjoy the protection and care of the State.

The prevention of the removal of German art treasures from the country is a function of the Commonwealth.

## ARTICLE 151.

The regulation of economic life must conform to the principles of justice, with the object of assuring humane conditions of life for all. Within

*Economic liberty* these limits the economic  
*governed by Na-* liberty of the individual shall  
*tional Law.* be protected.

Legal compulsion is permissible only for safeguarding threatened rights or in the service of predominant requirements of the common welfare.

The freedom of trade and industry is guaranteed in accordance with the national laws.

## ARTICLE 156.

The Commonwealth may by law, without impairment of the right to compensation, and with a proper application of the regulations relating to expropriation, transfer to public ownership private business enterprises adapted for socialization. The Commonwealth itself, the States, or the

*The Socialisation* municipalities may take part  
*of Industry.* in the management of business enterprises and associations, or secure a dominating influence therein in any other way.

Furthermore, in case of urgent necessity the Commonwealth, if it is in the interest of collectivism, may combine by law business enterprises and associations on the basis of administrative autonomy, in order to insure the co-operation of all producing elements of the people, to give to employers and employees a share in the management, and to regulate the production, preparation, distribution, utilization and pecuniary valuation, as well as the import and export, of economic goods upon collectivistic principles.

The co-operative societies of producers and of consumers and associations thereof shall be incorporated, at their request and after consideration of their form of organisation and peculiarities, into the system of collectivism.

#### ARTICLE 157. .

- *A uniform national law for labour.* Labour is under the special protection of the Commonwealth.

The Commonwealth will adopt a uniform labour law.

## ARTICLE 158.

Intellectual labour, the rights of the author, the inventor and the artist enjoy the protection and care of the Commonwealth.

The products of German scholarship, art, and technical science shall also be recognised and protected abroad through international agreement.

## ARTICLE 161.

For the purpose of conserving health and the ability to work, of protecting motherhood, and of guarding against the economic effects of age, in-

*Social insurance* validity and the vicissitudes  
*a National con-* of life, the Commonwealth will  
*cern.*

adopt a comprehensive system of insurance, in the management of which the insured shall predominate.

\* \* \* \* \*

## ARTICLE 163.

Every German has, without prejudice to his personal liberty, the moral duty so to use his

*The Right to* intellectual and physical  
*Work.* powers as is demanded by the welfare of the community.

Every German shall have the opportunity to earn his living by economic labour. So long as suitable employment cannot be procured for him, his maintenance will be provided for. Details will be regulated by special national laws.

\* \* \* \* \*

# ARTICLE 165.

Wage-earners and salaried employees are qualified to co-operate on equal terms with the employers in the regulation of wages and working conditions, as well as in the entire economic development of the productive forces. The organizations on both sides and the agreements between them will be recognized.

The wage-earners and salaried employees are entitled to be represented in local workers' councils, organized for each establishment in the locality, as well as in district workers' councils, organized for each economic area, and in a National Workers' Council, for the purpose of looking after their social and economic interests.

*The establishment of the National Workers' Council an exclusive National concern.*

The district workers' councils and the National Workers' Council meet together with the repre-

sentatives of the employers and with other interested classes of people in district economic councils and in a National Economic Council for the purpose of performing joint economic tasks and co-operating in the execution of the laws of socialization. The district economic councils and the National Economic Council shall be so constituted that all substantial vocational groups are represented therein according to their economic and social importance.

Drafts of laws of fundamental importance relating to social and economic policy before introduction (into the National Assembly) shall be submitted by the National Cabinet to the National Economic Council for consideration. The National Economic Council has the right itself to propose such measures for enactment into law.

*Bills relating to Social and Economic Policy must be submitted to the National Workers' Council before introduction.*

If the National Cabinet does not approve them, it shall, nevertheless, introduce them into the National Assembly together with a statement of its own position. The National Economic Council may have its bill presented by one of its own members before the National Assembly.

Supervisory and administrative functions may be delegated to the workers' councils and to the economic councils within their respective areas.

The regulation of the organization and duties of the workers' councils and of the economic councils, as well as their relation to other social bodies endowed with administrative autonomy, is exclusively a function of the Commonwealth.

\* \* \* \* \*

#### ARTICLE 170.

The Postal and Telegraphic Administrations of Bavaria and Wurtemberg will be taken over by the Commonwealth not later than April 1, 1921.

If no understanding has been reached over the terms thereof by October 1, 1920, the matter will be decided by the Supreme Judicial Court.

The rights and duties of Bavaria and Wurtemberg remain in force as heretofore until possession is transferred to the Commonwealth. Nevertheless the postal and telegraphic relations with neighbouring foreign countries will be regulated exclusively by the Commonwealth.

*The Supreme Court to arbitrate in disputes between National and State Governments over the transfer of Posts, Telegraphs, Railways and Canals.*



## ARTICLE 171.

The State railroads, canals and aids to navigation will be taken over by the Commonwealth not later than April 1, 1921.

If no understanding has been reached over the terms thereof by October 1, 1920, the matter will be decided by the Supreme Judicial Court.

\* \* \* \* \*

## ARTICLE 76.

The Constitution may be amended by process of legislation. But Acts of the National Assembly relating to the amendment of the Constitution are effective only if two-thirds of the legal membership

*The process of constitutional amendment.* are present, and at least two-thirds of those present give their assent. Acts of the National Council relating to the amendment of the Constitution also require a two-thirds majority of all the votes cast. If an amendment to the Constitution is to be adopted by the People by popular initiative, the assent of a majority of the qualified voters is required.

If the National Assembly adopts an amendment to the Constitution against the objection of the National Council, the President may not promulgate this law, if the National Council within two weeks demands a popular vote.

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## CHAPTER V.

## THE PROCESS OF CONSTITUTIONAL AMENDMENT.

The process of constitutional amendment has been allotted to a chapter by itself in order to emphasise the importance of the subject.

*Rome and England the leading types of Constitution.*

This is perhaps all the more necessary since the greater number of those who will read these pages have been brought up in the political habits of England in which the very simplicity of the process, which is effected by Act of Parliament like any other, conceals altogether the importance of what is being done.

On the threshold of the subject we are met by the necessity of understanding the kinds of constitution which exist and of defining their different characters before we can appreciate the appropriate methods of amending them. The nations which have most profoundly influenced the making of constitutions, in all civilised countries from ancient times down to the ratification of the German Republican Constitution the other day, are the Romans and the English. The Greeks, for all their intellectual fertility, lacked the

capacity for large scale enterprise, and bequeathed to the modern world nothing in political institutions to compare with the classical books of their political literature. The Romans, on the other hand, being less devoted to the pursuit of ideas, made their institutions almost solely with a view to the practical purpose in hand and thus evolved a pattern of government which, while not perhaps intrinsically superior to the Greek City States, possessed the power of expansion to a far greater degree. The English, likewise, relegating theory to a minor part in the making of constitutions, made of the British Constitution a mirror of the national character. And, as Rome carried her citizenship and her institutions over the ancient world, so England has spread her form of government widely through the modern world.

“It is, however, not merely the range of their influence,” says Lord Bryce in his stimulating essay on “Flexible and Rigid Constitutions” (*Studies in History and Jurisprudence*, Vol. I), “nor merely the fact that, as the Roman Constitution worked upon the whole of the ancient, so the English Constitution has worked upon the whole of the

modern world, that makes these two systems deserve constant study. Constitutions are the expression of national character, as they in their turn mould the character of those who use them; and the same causes which made both peoples great have made their political institutions also strong and rich, specially full of instruction for all nations in all times. There were in the fifth century B.C. hundreds of commonwealths in the Mediterranean countries with republican frames of government, many of which bore a general resemblance to that of Rome. There were in the fourteenth century A.D. several monarchies in Europe similar in their constitutional outlines to that of England, and with what seemed an equal promise of rich and free development. Of the former, Rome alone survived, destroying or absorbing all the rest. Of the latter, that of England is the only one which had at the end of the eighteenth century grown into a system at once broadbased and strong, a system which secured both public order and the freedom of the individual citizen, and in which the people were able to make their voice heard and to influence the march of national policy. All the others had either degenerated into despotisms or remained

comparatively crude and undeveloped. Thus when, after the flood of Napoleonic conquest had subsided, the peoples of the European continent began to essay the establishment of free constitutions, they found in that of England the model fittest to be followed, and sought to adapt its principles to their own several conditions. . . . It is, therefore, to Rome and to England that the eye of the student of political constitutions will most often turn. They represent the most remarkable developments of ordered political life for the ancient and for the modern world respectively. And whoever attempts to classify Constitutions and to note the distinctive features of the principal types they present, will find that it is from Rome and from England that illustrations can most frequently and most profitably be drawn ”.

From an examination of these two leading types

*Lord Bryce on rigid and flexible constitutions.* Lord Bryce proceeds to reject what he calls the old-fashioned classification of Constitutions

as Written and Unwritten, substituting for these descriptions the terms Rigid (the Roman) and Flexible (the English). His argument is too long for detailed examination here but the sum of it is that, whatever may be the constitutional needs

of a unitary State, a federal State requires a contract between the parties much more definite than is usually found in any Flexible (or Unwritten) Constitution. Moreover, the contract once made, the process of altering it must provide the States, the People and the Central Government alike adequate opportunity to consider what is proposed. Each type of Constitution no doubt has its drawbacks. A Flexible Constitution, while admirably adapted to meet emergencies in changing times, is on the whole too easily amended; while a Rigid Constitution, being difficult to amend, is on that account not so adaptable to any rapid or profound change of circumstances. "A Rigid Constitution," says Lord Bryce, "which has arrested various proposed changes, may be overthrown by a popular tempest which has gathered strength from the very fact that such changes were not, and under the actual conditions of politics could not be, made by way of amendment."

Now, once it is agreed that the political contract which is the foundation of a federal State requires the explicit form of a written or statu-

<p><i>A Rigid Constitution most suitable for a Federal State.</i></p>	<p>tory Constitution, the precise degree of rigidity in that Constitution is important—rigidity</p>
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being used here in Lord Bryce's sense as roughly synonymous with "Written"—and the question whether the centrifugal or centripetal forces within the State are the stronger becomes vital. As Lord Bryce says once more:—

“Where the centripetal force is palpably the stronger, either sort of constitution will do to hold the community together: and the choice between the two sorts may be made on other grounds. But where the centrifugal force is potent, and especially where there are reasons to apprehend its further development, the establishment of a Rigid Constitution may become desirable, and yet may be a matter of much delicacy and difficulty. If the constitution be framed in the interests of a centralizing policy, there is a danger that it may assume and require for its maintenance a greater strength in the centripetal forces than really exists, and that for the want of such strength the constitution may be exposed to a strain it cannot resist. Amid the constant change of phenomena, a Rigid Constitution necessarily represents the past, not the present; and if the tendencies actually operative are towards the dissociation of the component groups of the community, a frame of



government which fails to provide scope for these tendencies will soon become out of date and unfit for its work. Where, on the other hand, the existence of distinct groups, each desiring some control of its own affairs, is fully perceived and duly admitted as a factor in the condition of the community, and where it is desired to give legal recognition to the fact, and to protect the other local groups or sub-communities from being overridden by the largest among the groups, or by the community as a whole, the creation of a Rigid Constitution offers a valuable means of securing these objects. For such a constitution may be so drawn as to place the local groups under the protection of a fixed body of law, making their privileges an integral part of the frame of government, so that the whole Constitution must stand or fall with the maintenance of the rights enjoyed by the groups."

Accordingly, where a Constitution can be so fashioned and operated as to offer the disruptive forces just so much free play as may disarm their violence and to bring all parts of the country in reasonable acquiescence and unity under a Central Government, the principal instrument of government must be a Rigid Constitution and the process

of amendment must be neither too elaborate nor too easy.

At the present moment the Indian Constitution, as embodied in the Government of India Act, possesses in a sense the qualities of both the Rigid and the Flexible Constitution. It is flexible inas-

*The present character of the Indian Constitution.*

much as it can be amended by the simple process of ordinary parliamentary enactment. On the other hand, it bears a resemblance to the rigid type inas-  
much as its provisions appear in explicit and written form, and the process by which it is usually amended is not unlike that prescribed in federal Constitutions. That is to say, the practice has been either for discussions on Indian constitutional reform to arise between His Majesty's Government and the Government of India and to become the starting-point of a more or less prolonged examination of the requirements of the moment either by a commission appointed for the purpose or by other means. Only after this preliminary process of exploration is completed does the Imperial Parliament usually consent to enact any substantial change in the Indian Constitution. In future, whatever may be the enacting authority, that is to

say, whether it continues for some time to be the Imperial Parliament or whether Parliament voluntarily transfers this right to an indigenous body, the principle and the process will probably remain much the same. We may conclude, therefore, that, in proportion as the main features of the Indian Constitution reach their permanent form, the need for a Rigid Constitution prescribing for itself, amongst other things, a deliberate and definite process of amendment will become the more evident. A country so variously composed as India, and already divided into provincial areas which it would be difficult, if not impossible, to abolish, is an appropriate region for a federal Constitution and, from whatever standpoint we approach it, requires a Constitution expressly made in the form of a special Statute.

Article V of the Constitution of the United States prescribes the manner in which the Constitution can be amended as follows:—

*The American method of amending the Federal Constitution.*

“The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or,

on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

Here the American process of amendment may begin either in Congress, the Central Legislature, or by the combined will of not less than two-thirds of the individual States. Thus, the process may be initiated by the National representatives in the First Chamber with the consent of the State representatives in the Second Chamber or by some motive operating originally and entirely from

State sources, that is, in the State Legislatures. Whichever be the originating source, and whether the amendments themselves are proposed by Congress or by a special Convention, the final authority lies with the majorities in the Legislatures of three-fourths of the several States—that is to say, it resides in the original parties who created the American Union. It will be observed that there is provision for any State which so desires it to consider the amendments in a special Convention elected *ad hoc*, but the usual modern practice is for amendments to be referred to the State Legislature itself.

The individual American State as distinct from the United States, amends its Constitution in conformity with the provisions of the *Amendment of the Constitution of an American State*. The almost invariable practice follows a line not unlike that of Article V above. In some cases the process of amendment may be launched by a minimum number of electors expressing their desire in a prescribed way or it may be started by a Resolution of the Legislature itself. The ratification in some cases takes place by popular vote throughout the States and in other cases by reference to a Convention elected for the purpose.

Chapter VIII, Article 128, of the Australian  
*The Australian* Constitution, runs as fol-  
*method.* lows :—

“ 128. This Constitution shall not be altered except in the following manner :—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two or more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made

or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives. When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law; and if a majority of all the electors voting also approve the propos-

ed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law."

It is here to be observed that the Imperial Parliament, by enacting this provision in the Commonwealth of Australia Constitution Act, 1900, voluntarily transferred to the Australian people and the Australian Parliament one of the fundamental factors in national sovereignty. It is true that the Article provides for the prior assent of the Crown before the measure will come into operation, but the refusal of the Crown in such an event is either unthinkable or only thinkable in such circumstances as must mean the secession of Australia from the British Empire.



Let us examine a little more closely the stages  
*The Australian method in detail.* by which the Australian Constitution can be amended :—

- (1) It is obvious that no proposal for the amendment of the Constitution, except possibly during a war, could mature so rapidly in the public mind as to take any section of Australian opinion by surprise. Therefore, the incubating process through which a proposed amendment must pass before it can even appear in the Australian Parliament as a Bill will be of considerable length. Short of the usurpation of constitutional power by an Australian Musso'ini, and in the absence of any such emergency as war, the precipitate enactment of any substantial amendment would be extremely difficult if not impossible.
- (2) The proposal is introduced either in the Senate or in the House of Representatives. Its passage through either House or both will take some time and will offer public opinion a second opportunity of deliberation.

- (3) After its final passage through both Houses the Bill must remain under the scrutiny of public opinion for not less than two months and not more than six.
- (4) Finally, it is submitted by referendum to the whole body of electors in each State for their acceptance or rejection.
- (5) If in a majority of the States a majority of the electors accept it and moreover only if a majority of the whole Australian electorate also accept it, then and then only does the Governor General submit it to the Crown for assent.

The foregoing process applies only where both Houses agree to the proposed amendment. Where the Houses disagree, the original enacting House may, after an interval of three months, pass the proposed amendment once more by an absolute majority. If the other House again rejects the amendment or attempts to amend it in a manner distasteful to the originating House, the Governor General may submit the proposed amendment, either with or without the amendments, if any, which the other House attempted to introduce, to the same process of electoral judgment as described above.

The British North America Act, 1867, contains no provision for altering the Constitution. There-

*The Canadian method.* fore, the process of Constitutional amendment belongs

not to Canada but to the Imperial Parliament.

On this Mr. Justice Riddell in "The Canadian Constitution in Form and in Fact" says :—

"The old Province of Lower Canada which expired as a legal entity in 1841 by the effect of the Union Act which united the Provinces of Upper Canada and Lower Canada into the Province of Canada, was largely populated by French Canadians almost all of whom were Catholic and much attached to their old law and customs ; the remainder of the people of the new Dominion were largely English-speaking and Protestant, in general attached to English law and customs. While the French-Canadians were willing to enter into a contract with their English-speaking brethren, they were not willing to enter into a contract which could be varied by the more numerous English without their consent.

There is, however, no difficulty in having an Amendment made if and when desired. An Address to the Sovereign is passed by both Houses of Parliament at Ottawa asking for the Amendment specified. According to the unwritten Constitution, the vote on the Address must be unanimous (or practically unanimous) or it will not be forwarded to London. When the Address is received by the Colonial Secretary in London, the desired amendment to the British North America Act is passed by the Imperial Parliament as of course and without debate. This is, in substance, simply giving legal validity to an amendment agreed upon by the parties to the original contract, which they desire to amend."

Under Chapters IX and X of the South Africa Act, 1909, the South African Parliament may alter the boundaries of any province, divide a province into two or more provinces, or form a new province out of provinces within the Union, and may further by law repeal or alter any of the

*The South African method.*

provisions of the Act itself. The provisions of these two chapters are as follows :—

“ IX.—NEW PROVINCES AND TERRITORIES.

149. Parliament may alter the boundaries of any province, divide a province into two

*Alteration of boundaries of provinces.* or more provinces, or form a new province out of provinces within the Union, on the

petition of the provincial council of every province whose boundaries are affected thereby.

150. The King, with the advice of the Privy Council, may, on addresses from the Houses of Parliament of the Union, admit into the Union the territories administer-

*Power to admit into Union territories administered by British South Africa Company.* ed by the British South Africa Company on such terms and conditions as to representation and

otherwise in each case as are expressed in the addresses and approved by the King, and the provisions of any Order in Council in that behalf shall have effect as

if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

151. The King, with the advice of the Privy Council, may, on address: from the Houses of Parliament of the Union,

*Power to transfer to Union, government of native territories.* transfer to the Union the government of any territories, other than the territories administered by the

British South Africa Company, belonging to or under the protection of His Majesty, and inhabited wholly or in part by natives, and upon such transfer the Governor-General in Council may undertake the government of such territory upon the terms and conditions embodied in the Schedule to this Act."

#### "X.—AMENDMENT OF ACT.

152. Parliament may by law repeal or alter any of the provisions of this Act: Pro-

*Amendment of the South Africa Act.* vided that no provision thereof, for the operation of which a

definite period of time is prescribed, shall during such period be repealed or altered: And provided further that no repeal or alteration of the provisions contained in this section, or in sections thirty-three and thirty-four (until the number of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections thirty-five and one hundred and thirty-seven, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament."

Thus the only circumstances in which any special provision for constitutional amendment is laid down are :—(a) any variation in the number of representatives assigned to each province in the

South African Parliament, (b) any change in the qualifications of voters, and (c) any proposal to affect the equality of the Dutch and English languages as the official languages of the Union. In respect of the main provisions of these two chapters, South Africa, as in other things, departs from the customary federal form.

Chapter III of the Swiss Federal Constitution provides for the revision of the Swiss Federal Constitution by federal legislation duly passed through both Houses: Provided, however, that, if one Chamber rejects the proposals of the other or if fifty thousand duly qualified Swiss citizens demand any particular amendment, the disputed amendment, in the first case, or the amendment demanded by popular vote in the second, shall be submitted for a simple "yes" or "no" to the vote of the entire Swiss electorate. If in either case there is an affirmative majority for the proposal, it is referred to the Federal Legislature for consideration and enactment. Finally, under Article 121, the Federal Constitution thus revised comes into force only when it has been adopted by a majority of those Swiss citizens who take part in the referendum and also by a majority of the Cantons—the



result of the popular vote in each Canton being considered as the vote of that Canton.

The provision for the amendment of the Imperial German Constitution is contained in Chapter 14, Article LXXVIII :—

“ LXXVIII. Alterations in the Constitution take place by  
*The method in* way of legislation.  
*Imperial Germany.* They are considered  
 as rejected if they have 14 votes in the  
 Council of the Confederation against  
 them.

Those provisions of the Constitution of the Empire, by which certain rights are established for separate States of the Confederation in their relation to the community, can only be altered with the consent of the State of the Confederation entitled to those rights ”.

These provisions are interesting in the practical control over the amendment of the Constitution which they gave to Prussia. Prussia controlled enough votes in the Bundesrat (Council of the Confederation) to prevent any amendment of the Constitution being enacted against her will. In

respect, therefore, of the special position of Prussia, in respect also of the protection of the rights of the individual States granted by this Article, the States may be said to have been compensated to some extent for their loss of legislative control over many subjects which would naturally appear to belong to them.

*The method in* Article 76 of the German  
*Republican Ger-* Constitution of 1919 runs as  
*many.* follows :—

“ The Constitution may be altered by legislation. But decisions of the Reichstag as to such alterations come into effect only if two-thirds of the legal total of members be present, and if at least two-thirds of those present have given their consent. Decisions of the Reichsrat in favour of alteration of the Constitution also require a majority of two-thirds of the votes cast. Where an alteration of the Constitution is decided by an appeal to the people at their request, the consent of the majority of voters is necessary.

Should the Reichstag have decided upon an alteration of the Constitution in spite of the protest of the Reichsrat, the President of the Federation is not allowed to promulgate this law if the Reichsrat, within two weeks, demands an appeal to the people."

The provisions of this Article are not as precise as is usual in other Constitutions ; but it is clear that a two-thirds majority is required in both Chambers and that, if the required majority is forthcoming in each case, there is no appeal to the people or to the States. Where, however, the Second Chamber disagrees with the First, and where the Second Chamber demands a popular vote, the President must submit it to the people as a whole who may assent to it by a simple majority.

There is one feature common to America, Australia, Switzerland and Republican Germany, though naturally omitted from the Constitution of Imperial Germany, and for historical reasons from the Constitutions of Canada and South Africa, which could hardly for a long time to come find a place in any future Indian Constitution. To make the whole body of the electorate the final

court of appeal in the amendment of the Constitution presupposes a population educated both in ordinary instruction and in the rudiments of politics to a degree far higher than obtains anywhere in India or is likely to obtain for many years to come. Even in the present restricted electorate, not one elector in a thousand is capable of appreciating the issues involved in the amendment of a Constitution. Moreover, the interest hitherto taken by the Indian electors in ordinary political questions offers little justification for the extension of the elector's rights to cover matters affecting the future of the Constitution.

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## CHAPTER VI.

## SOME CONCLUSIONS.

The account given in the preceding chapters of the seven principal Federal Constitutions in the modern world enables us now to present certain conclusions regarding the fundamental principles of Federalism itself. A Constitution, to be called federal, must present prominently certain political features ; and, though some of the Constitutions described in the foregoing pages do not fully respond to the test, the fact remains that the essence of a federal system lies in the following factors :—

- (1) The Constitution itself appears in the form of a written Statute supreme over all other instruments of Government and subject usually to a process of amendment more elaborate and deliberate than the enactment of ordinary law ;
- (2) The Constitution assigns to the component parts of the Federation, Federal and Provincial, specific functions in legislation, in judicial competence and in executive action ;

- (3) The Constitution separates these spheres in such a manner as to permit the Federal Power and the Provincial Power, respectively, the completest possible freedom of action each in its allotted area: including direct contact by the Government with the individual citizen in respect of its legitimate functions;
- (4) The Constitution assigns the duty of interpreting its provisions to a Court (or Courts) of Justice, usually to a Federal Supreme Court.

Taking the supremacy of the Constitution first, we observe that all the federal systems under consideration conform to this condition, which indeed must be the pivot of federalism in practice. It is true that, owing to the fiction of the legal sovereignty of the Imperial Parliament, the Constitutions of all the British Dominions do not appear to be completely supreme; but inasmuch as political sovereignty belongs without a doubt to each of the Dominions, the Dominion Constitution in each case is the sovereign document. Even in Canada, where no constitutional amendment can be made within the Dominion,

but must go to the Imperial Parliament for enactment, this form covers the reality by which the decision as to what the amendment shall be is made in Canada, though the act of legislating is performed at Westminster. A federal constitution, being a solemn contract—the most solemn that can possibly be made—between two parties whose interests transcend those of any other kind of party, necessarily is enshrined in a form peculiar to itself. It is no ordinary statute, and is therefore not variable by the ordinary method of enactment: and if its written character is necessary to give its provisions the required precision, it cannot be changed except by a deliberate process which shall elicit without haste or ambiguity the mature opinion of the parties to it. I have assigned to a separate chapter the description of the process of constitutional amendment in each federal system, because it is important enough for separate consideration. I therefore pass to the second feature, namely, the assignment to the component parts of the Federation, Federal and Provincial, of specific functions in legislation and in executive action.

The division of functions and subjects between the Central and Provincial Governments under a

*The line drawn between Federal and Provincial subjects.* federal system follows varying lines in the constitutions which we have examined. There is a certain minimum of power which every Central Government possesses in a Federation; and the residue of power may fall on the one side of the line or the other. The point to observe is that the smooth operation of a Federal system depends more upon the line itself being definite than upon the assignment of subjects to one side or the other. The deliberate aim of the makers of the American Constitution, as we have seen, was to keep the two parties to the Federal compact as distinct from one another as possible and to afford them the fewest possible points of contact and therefore of collision. The aim is undoubtedly one which the makers of every Federal Constitution should hold before themselves, and its realisation will always depend to no small extent upon the distinctness with which this line of division is drawn.

There are a number of what we may call primary subjects which belong to the Central Government under practically every form of Federalism. *Allotment of subjects.* These are foreign relations, defence, national



communications (*e.g.*, railways, posts, telegraphs, canals), commerce, coinage, banking, the issue of paper money, insurance and so on. A glance at Chapter IV will show that no two Constitutions draw the line in the same place, but that even those deliberately designed to restrict the Central power, give the Federal Government practically all the fundamental powers.

The control of armed force is in the last resort the mainspring of Government. It is therefore

*The position of the Army in different Federal States.* important to know which authority in a Federal State wields this control, and to what extent.

AMERICA.—America possesses a national army under the direct control of the President, *i.e.*, the Central Government, who may employ it to quell domestic disorder in a State on the request of the Governor or of the Legislature of that State. By his implied powers for the peace, order and good government of America, he may use it, and has used it, to suppress rebellion against the Central authority.

America further possesses a militia raised by each State under the control of the Governor, which may be ordered by the President to move into another State in the circumstances described on page 55.

AUSTRALIA.—The Australian Commonwealth Government, under its constitutional obligation “to defend the Commonwealth and the several States,” exercises sole authority over the armed forces of Australia. The Command-in-Chief is vested in the Crown or the Governor General, which in practice under responsible government means the Cabinet of the day ; and the States are forbidden to raise armed forces of any kind without explicit authority from the Commonwealth Government. It follows from this that the authority of the Commonwealth Government to employ armed force to quell domestic disturbance or insurrection is in theory unlimited ; but the present situation in Australia (1925) may perhaps be read as a warning that the power of the Common-

wealth in this respect in practice might be limited.

CANADA.—The British North America Act assigns to the Canadian Parliament exclusive legislative authority over “militia, military and naval service, and defence.” The Command-in-Chief is vested in the Crown, and the Canadian Government may move troops to any part of the Dominion for any purpose.

SOUTH AFRICA.—Here again, the Crown or the Governor General is Commander-in-Chief and the authority over the army in every respect belongs to the Union Government who may send it to any part of the Union for any legitimate purpose.

SWITZERLAND.—There is no permanent Federal army in Switzerland, but those called up for their annual military training serve under Federal control. The permanent military force of Switzerland is composed of the militia of the Cantons, limited to three hundred men apiece; and in any situation requiring the use

of military force, the first initiative lies with the Cantons, both where domestic disturbance passes beyond police control, and where a Canton is threatened by foreign attack. Only in a great emergency is the Federal Government entitled to act before receiving an appeal from any Canton.

**IMPERIAL GERMANY.**—The army in Imperial Germany was controlled by Imperial authority except in Bavaria and Wurttemberg. The raising of troops, their training, the promotion of officers and so on, in Bavaria belonged to the State Government ; but on the outbreak of war the Bavarian Army passed under the control of the Imperial General Staff. In practice Imperial control meant Prussian control for the King of Prussia as Kaiser was Imperial Commander-in-Chief and the Constitution explicitly provided that “after the publication of this Constitution the whole Prussian Military Code of laws is to be introduced throughout the Empire without delay.” The other exception to Imperial, *i.e.*,

Prussian control was Wurtemberg, which escaped Imperial dictation to a large extent though not so completely as Bavaria. In time of peace the Kaiser could move troops to any part of the Empire except Bavaria and Wurtemberg for any purpose. In time of war, the entire forces of the Empire, including those of these two States, passed under one control.

**REPUBLICAN GERMANY.**—Defence, and all that pertains to it, comes under the exclusive control of the National Government in Republican Germany, which according to the Constitution has sole legislative power over the military organisation.

When we come to the control of police, we find that in all seven Constitutions under considera-

*The police power usually a provincial function.* tion it belongs in the main to the States and only in

South Africa and in Republican Germany is any substantial police power conferred on the Federal Government. It must be understood, of course, that for special purposes in

a Federal system the Central Government often appoints its own police ; but in the sense in which the term is usually understood the subject belongs to the States. Where the Central Government possesses any substantial police power, there is usually a concurrent power in the States also.

Commerce is a subject which has disturbed the operation of Federal Constitutions in

*The control of modern times more perhaps commerce in a than any other. All seven Constitutional systems under consideration*

assign to the Central Government the general control of commerce, comprising trade with foreign countries and trade between provinces ; but since this is accompanied by the control by the province itself of all commerce within its own borders, there is ample room for doubts and conflicts. Some of the most violent political controversies of the past two generations in America have raged round this question, arising usually from the failure of an individual State to control the operations of an industrial or financial organisation which was in reality bigger than itself. The same trouble arose in Australia, as we have seen, after the war ; and the line taken by the Australian Prime Minister at that time

followed the course into which all Federal Governments have been driven, namely, that of stretching out to grasp as firmly as possible control over commerce as a whole. Of the individual Constitutions described in Chapter IV, Republican Germany has the largest Central control, and Switzerland the most unusual departure from the standard Federal form, inasmuch as the Swiss Cantons possess the remarkable right of making commercial treaties with foreign powers on their own account.

The related subjects of Ports and Pilotage are to be seen on both sides of the line of division

*Ports and Pilotage* in these seven Constitutions.

They belong to provincial control in America and Australia; but, by the exercise of powers implied in the control of national commerce, the Federal Government in both cases has largely encroached on the domain of the individual States. In Canada and South Africa, these are practically exclusive national subjects; while the constitution of Republican Germany in this as in other matters shows a large increase of the Central power as compared with that wielded by the Imperial Government.

We may observe that in the case of Australia the increase in the power of the Central Government has occurred not only by the implications contained in the Federal control of commerce but also in virtue of the Merchant Shipping Acts of the Imperial Parliament which (*e.g.*, that of 1894 in sections 102, 264, 280, 444, 478) explicitly confer powers on the Dominion Parliaments.

Judging from the provisions of these seven Constitutions there would appear to be no *Certain other* reason in principle why the *subjects.* subject of Marriage, for instance, should be assigned to one side of the line or the other. In the United States it is exclusively a provincial subject. In Australia it is exclusively a Federal subject, but since the Marriage laws of England have from the outset been held by the courts to be in force in Australia, no Marriage law has yet been enacted, nor any relating to divorce. In Canada, no doubt owing to the confessional complication, marriage is both a Federal and a provincial subject. The British North America Act assigns marriage and divorce to the exclusive control of the Canadian Parliament and permits a provincial legislature to pass laws concerning "the solemnisation of marriage in the



province." The result of this is that, though the British North America Act would appear at first sight to proceed on the opposite line from the Constitution of the United States, the result in practice is almost the same. The greater part of the legislation governing marriage in Canada is of provincial and not of Federal origin. At the same time, owing to the greater homogeneity of the population and their more conservative instincts, the marriage law of Canada does not present the same array of experiments as that of the United States of America. In Switzerland and South Africa, marriage is exclusively a national subject. Criminal law, public health and sanitation, and cognate matters presuming the exercise of the police power in administration, are usually Federal subjects, the United States being the most signal instance of provincial control over them.

The third essential feature of a Federal system is the separation of the two spheres, accompanied by the power in each Government respectively to make its will effective within its proper sphere. This was

*Direct contact  
with the citizens is  
essential to a Gov-  
ernment.*

the lesson of Bismark's rhyme about the Frankfort Diet of 1848 :—

“ O Bund,

“ Du Hund,

“ Du bist nicht gesund !

as it was also the theme of two of Alexander Hamilton's most eloquent letters, Nos. 15 and 16 of “ The Federalist”. The laconic pungency of Schönhausen and the polished American argument sprang from the same source in bitter experience of Government unable to make its will effective. We have already noted how the lesson has not been lost in the American Constitution which replaced the Articles of Confederation, nor in our own time upon the Government of India.

The fourth feature which appears in all true Federal Constitutions is the creation of a Federal

*The federal function of a Supreme Court.* Supreme Court to act both as a final Court of Appeal, and especially as an interpreter of

the Constitution. True, the Constitutions described in Chapter IV do not all conform to this standard ; but most historians and commentators in describing the standard Federal system have found in this particular judicial feature one of the essential marks of Federalism.

## CHAPTER VII.

## PROVINCIAL AUTONOMY IN INDIA.

The phrase "provincial autonomy" occurs frequently in political controversy in India; and, as it is commonly used to cover two separate constitutional conditions, it is necessary to disentangle the correct from the incorrect use before proceeding to examine its bearing in India. It was pointed out in Chapter II that "owing to a somewhat careless use of language in controversy, the meaning of the phrase is not always clear". Most Indian controversialists employ it to describe both the freedom of the Provincial Government from external control by the Government of India and the internal political condition of representative and responsible government. The true meaning of the word lies in the former interpretation. Provincial autonomy does not of necessity tell us anything of the condition of domestic government prevailing in any province or state; and for the purpose of the present inquiry the term can have no meaning but that which derives from

*Its true meaning.* the relation of a Governor's Province to the Government of India and ultimately to the Crown itself as represented by the Secretary of State and the Imperial Parliament.

It is natural that the subject of Provincial Autonomy should stand in the forefront of contemporary Indian politics, for the condition which it describes is necessary to Indian progress under the conditions of the division into Provinces and the intention of Parliament as expressed in the Preamble to the Government of India Act. In spite of the language of the fifth paragraph of the Preamble, and in spite of relaxation rules made under sections 19A and 45A, the degree in which the provinces are released from superior control is still capable of large extension. Even the Devolution Rules themselves, which as a constitutional document bears some resemblance to those provisions of other Constitutions which assign powers and functions to the different bodies composing a Federation, have in reality left the ultimate authority of the Imperial Parliament and the Government of India over all Indian affairs practically unimpaired.

The Indian Constitution, embodied in the Government of India Act, is essentially that of a Unitary State: for, while it contains provisions which may be called Federalism *in embryo*, it vests sovereignty in the Imperial Parliament, with the Secretary of State and the Government of India as the agents. The restrictions upon this sovereignty as noted above—*e.g.*, under sections 19A and 45A which, with their dependent Rules, relax the control of the Secretary of State and of the Government of India—are not absolute but are conditional upon the satisfactory administration of the Transferred Subjects [see Transferred Subjects (Temporary Administration) Rules]. Inasmuch, therefore, as power is retained by which even the Transferred Subjects can be removed from the control of a Provincial Council, in certain circumstances, the autonomy enjoyed by a province over matters apparently consigned to its care is limited and conditional.

In a recent memorandum on the legal and constitutional possibilities of advance within the Government of India Act presented to the Reforms Enquiry Committee, 1924, the Gov-

*Responsibility of Parliament.*

ernment of India said, in respect of its own position under the Act:—"The fundamental characteristics of the existing Constitution are that the Act maintains the responsibility of the Government of India to His Majesty's Government and to Parliament"; and of the provincial position under the Act they said:—"Perhaps the main feature of the existing constitutions of Governors' Provinces is the separation of functions for which they provide. The constitutions provide for the discharge by the Provincial Governments within their own Provinces of many duties as agents of the Central Government, that is, in regard to central subjects. In regard to provincial subjects authority is, with certain qualifications, *definitely committed* to the Provincial Governments to which also portions of the revenues of India are definitely allocated in order to enable them to meet the expenditure involved in administering the provincial subjects. The provincial subjects are divided into two classes, the reserved subjects and the transferred subjects. In regard to reserved subjects the constitution maintains the responsibility of the Provincial Government to the Governor General in Council, to His Majesty's Government and to Parliament.

The extent of the control of the local legislature over the executive Government in regard to the administration of such reserved subjects was intended to be similar to that of the Indian legislature over the Central Government. Such reserved subjects are administered by the Governor in Council. The transferred subjects are administered by the Governor acting with his Ministers and in relation to these subjects the constitution provides that the Governor shall be guided by the advice of his Ministers unless he sees sufficient reason to dissent from their opinion in which case he may require action to be taken otherwise than in accordance with that advice. In administering these subjects it was intended that the Ministers should be responsible to the local Legislative Councils."

The words "definitely committed" which I have placed in italics in the second of these paragraphs must be read, not in the sense in which an American State possesses absolute power to make its own marriage laws, but in a more limited sense, which owing to the transitional character of the Indian Constitution and to the lack of precision in many of its provisions, is somewhat diffi-

*Limited Provincial Autonomy.*

cult to define. For instance, the Government of India has stated at different times that it accepts the principle that an official government which is not subject to popular control cannot properly be legally exempted from superior official control, and in the same memorandum presented to the Feetham Committee on the Division of Functions in 1918-19, it says that, while there are certain subjects at present under the direct administration of the Government of India..... there are at the other end of the line matters of predominantly local interest. "Between these extreme categories, however, lies a large indeterminate field which requires further examination before the principles determining its classification can be settled. It comprises all the matters in which the Government of India at present retain ultimate control, legislative and administrative, but in practice share the actual administration in varying degrees with Provincial Governments. In many cases the extent of delegation practised is already very wide. The criterion which the Government of India apply to these is whether in any given case the Provincial Governments are to be strictly the agents of the Government of India, or are to have acknowledged authority of their own". On this point the Feetham Committee said :—



“ We recognise the distinction above drawn between the two classes of functions discharged by Provincial Governments—  
 (1) Agency functions in relation to All-India subjects and (2) Provincial functions

*The Feetham  
 Committee's  
 opinion.*

; properly so called. The distinguishing feature of the work done in discharge of agency functions is that it relates to subjects in which All-India interests so far predominate that full ultimate control must remain with the Government of India, and that, whatever the extent of the authority in such matters for the time being delegated by the Government of India to the provinces as their agents, it must always be open to the Government of India to vary the authority and, if need be, even to withdraw the authority altogether. Provincial functions relate to subjects in which, to use the words of the Government of India Memorandum, “ the interests of the provinces essentially predominate ”, and in which Provincial Governments are therefore to have “ acknowledged authority of their

own." We recognise the difficulty of stating the matter in more precise terms. Circumstances, and the experience gained in the working of the existing Local Governments, have largely decided in practice what subjects must fall in the provincial class; but the general subordination of Local Governments to the Government of India under the terms of the Government of India Act, and centralization in finance, have in the past tended to obscure the actual dividing line between All-India and provincial subjects, which also governs the separation in the provinces of agency from provincial functions."

It is appropriate here in parenthesis to take note of the fact that the administrative action of the Finance Department under Sir Basil Blackett has secured for the Government of India its own agents in respect of important Central subjects, and it has thus brought to the forefront some—though not all—of those "administrative considerations" which were present to the minds of the

*The Government of India and the agents for Central subjects.*

Reforms Enquiry Committee of 1924 when they drew public attention to the fact that the problem of administrative reconstruction, presented by the emergence of provincial autonomy as an urgent question, was perhaps more difficult to solve than any of the political implications accompanying it. The subordination of Provincial Governments to the Government of India and the subordination of the Government of India in its turn to the Secretary of State have in the past been such important features in the Indian polity that, if the constitutional relation of any one of these authorities to the other two is substantially changed, a great part of the administrative edifice will have to be reconstructed. It is a matter of common knowledge, of course, that the reconstruction, in a sense, has already begun.

This reconstruction, however, follows the same somewhat haphazard course as the political and

constitutional changes which  
*Clearer definition of functions needed.* have come about in India in the past. No attempt has yet been made to refashion the Indian Constitution on the federal principle. Each successive amendment has been designed to meet a political need and thus the provisions of the Act are to be regarded

more as practical expedients than as parts of a comprehensive constitutional plan.

The Reforms Enquiry Committee in their Majority Report (page 43) emphasise the fact that "much clearer definition and a much closer examination of the relations between the central and local Governments would be an essential preliminary to any scheme of provincial autonomy in India." The argument of which this sentence is a part, runs as follows :—

- " 48. The essential feature of any system of provincial autonomy is the division of functions between the central and provincial governments, and that is a matter which has presented great difficulties in all federal constitutions. Now, prior to the Government of India Act, 1919, the Central Government retained complete control over all provincial governments. Thereafter a separation of functions as regards provincial transferred subjects has been attempted, but the distinction between central subjects and provincial reserved subjects is admittedly lacking
- Reforms Enquiry Committee: opinion of the Majority.*

in definition. Much clearer definition and a much closer examination of the relations between the central and local governments would be an essential preliminary to any scheme of provincial autonomy in India. It may further be pointed out that the mere transfer of all provincial reserved subjects would not meet the case. It is exceedingly doubtful if, on examination, it will be found that several of the subjects now classed as provincial could under any system of provincial autonomy be entirely provincialized. The central government now derives its power of control over these subjects from the fact that it is still supreme on the reserved side, but with the transfer this control would disappear.

It seems certain that in the event of the transfer of all subjects the existing rule 49 of the Devolution Rules would leave an insufficient control in the Central Government. In this connection it may be well to remind those who look forward to responsible government both in the central and provincial spheres that the reserva-

tion of powers to the Central Government is certainly not less important in the case of a democratic Government. In India the residuary power is with the Central Government at present, and we think it should probably be retained there.

49. Another essential feature of any such

*Separation of Finances.* system is the separation of finances between the central and provincial Governments. At present under section 20 of the Government of India Act the revenues of India are received for and in the name of His Majesty. It is true that the provinces have been allocated some of those revenues by the Devolution Rules made under section 45A, but it is only the Secretary of State in Council who can be sued under section 32. A local government may raise money under sub-section (1a) of section 30 on the security of the revenues allocated to it, but it must do so on behalf and in the name of the Secretary of State in Council. Even in the case of the Union of South Africa where the central government retains

much greater control than in other federal constitutions within the Empire, separate provincial revenue funds have been established for the provinces. The revenues allocated to local governments must in fact be separated and held in separate accounts from the central revenues before anything in the nature of provincial autonomy could be set up. So long as the central government is responsible for the provincial ways and means programmes, so long obviously must it retain control in certain financial matters. For full provincial autonomy separate consolidated funds for the provinces would have to be constituted, and, as the right to sue government is recognised in section 32, it would further be necessary to provide that, when the claim, if established, would have to be met from such consolidated funds, the suit would lie against the province.

The existing limitations upon provincial autonomy in regard to the provincial borrowing powers are contained in the Local Government (Borrowing) Rules.

In India the central and provincial governments tap the same sources when they go into the money market. It seems therefore clear that, for as long as we can foresee, if a competition in interest rates is to be avoided which would be opposed to the interests of both sides, there must be some control over the borrowing powers of the provinces. The control would be required to secure co-ordination as to the times when the provinces should go into the market.

50. Before any system of provincial autonomy could be introduced into India the

*A clear line to be drawn in taxation and legislation.* question of the definition of the fields of taxation and legislation would require much closer examination, and the extent to which it would

be necessary for the central government to employ its own agents for the administration of its own subjects would become of the greatest importance.

Similarly much more definite provision would be required to provide for the enforcement of the authority of the central gov-



ernment over the provincial governments and the citizens subject to its central laws.

51. These are the factors which we think merit consideration before it is assumed that provincial autonomy is in the main a question of political advance which is severable from administrative considerations."

The Minority Report of the same Committee is on the whole more concerned with political

*The opinion of the* considerations than with the  
*Minority.* constitutional aspects of provincial autonomy ; but there are passages in their argument which are pertinent here :—

“ We recognise that it is impossible to dispense with the Central Government. The Central Government will perhaps be the most potent unifying factor between province and province and we think that it will be charged with the vital responsibility of securing national safety. In the present state of things the Central Government exercises control over provincial Governments of a three-fold character,

namely, financial, legislative and administrative. In any scheme of provincial *Financial Autono-* autonomy it seems to *my.* us to be vitally necessary that the finances of the provinces must be separated from those of the Central Government. This will necessarily entail a determination of the sources of revenue to be assigned to each, of the limitation of the field for taxation for each so as to avoid conflict between the two and of the prescription of the limits within which and the conditions subject to which provincial Governments may go into the market for the purposes of borrowing. This will also involve the overhauling of the entire machinery including the system of audit and account. In recent years there has been a movement in the Central Government for establishing its special agency for the collection of central revenues, such as income-tax. Such agencies may have to be multiplied, though we do not think that it is necessarily incompatible with the system of

provincial autonomy that the Central Government should requisition and pay for the services of the provincial Governments for agency work. Nor do we think that the establishment of provincial autonomy necessarily involves the establishment of federal courts. We should not be supposed to favour the creation of such courts, as we think there is no constitutional bar to the provincial courts dealing with cases arising out of matters within the domain of the Central Government."

Those who have read with care Chapter IV in the present volume will hesitate to agree with the Minority that there is no constitutional bar to the provincial courts dealing with cases arising out of matters within the domain of the Central Government.

The Minority of the Committee then proceed to consider the question of legislative autonomy. They declare that, while the ultimate power of veto exercised by the Governor General is indispensable from a constitutional point of view, and while " it is well known that not only in

*The Minority on  
Legislative Auto-  
nomy.*

fully responsible constitutions but also in a constitution like ours it is very sparingly exercised", both it and the power of previous sanction embodied in section 80 A(3) of the Government of India Act should be reconsidered and the list of subjects to which the latter at all events applies should be carefully revised and the area of its application substantially circumscribed. At the same time, the Committee declare that they do not think the doctrine of previous sanction, subject to such further limitation, "is necessarily inconsistent with the ideal of provincial autonomy."

Another important declaration by the Minority is contained in the words: "As stated already,

*Residuary Power:* we think that the spheres of  
*an important state-* action with regard to legisla-  
*ment by the Minor-* tion should be carefully defined.  
*ity.*

This has been done in Canada and the Commonwealth of Australia, though the points of view adopted in the two Dominions are not the same. In the former the residuary power rests with the Federal Parliament; in the latter it rests with the States. We think that in the circumstances of India it is necessary that the residuary power should be vested in the Central Government."

A different aspect of the relations between Central and Local Governments appears when we turn to the Indian States. Section 33 of the Act vests "the superintendence, direction and control of the civil and military government of India in

*The Indian States* the Governor General in  
*and the question of* Council ....."  
*Local Autonomy.* India here means not only British India, but the whole territory of the Indian States as well. Now, looking at the relations of the Government of India and the Indian States in the light of federal principle, we observe that—

- (a) the Indian States enjoy a large measure of autonomy in domestic affairs both legislative and administrative, subject to the right of the Government of India to intervene to correct actual misgovernment ;
- (b) the Indian States are preserved in their treaty rights by Section 132 ;
- (c) the Government of India possesses paramount powers , comparable to those of a federal Government, over the foreign relations of the Indian States, over the succession to the State, over its armament, over the ultimate security of each

State from attack and, finally, over the behaviour of any State which transgresses the bounds of humanity and good government within or without its own borders.

Now, it will not escape notice that, though the Indian States hardly appear from Preamble

*The Indian States* to Schedule in the Govern-  
*affected by recent* ment of India Act, the political  
*changes.* changes of which the Act is a  
part have affected their interests, and will affect them still more as time goes on.

Still more evident does the connection become when the Legislature passes an Act to raise customs duties, *e.g.*, the Steel Protection Act. Moreover, the action of an Indian State may seriously affect the excise policy, to take but one notable instance among many, of its neighbours, whether they be British Provinces or other Indian States. Here again the political advance of India has placed in the incubator another problem which cannot be shirked at the next examination of the Constitution.

If India is about to move towards the goal of federalism, the Indian States may well claim a share in the discussion, and a place in eventual

federation. The fact that their Governments vary

*Their right to be* in character and present great  
*heard.* contrasts to the Provinces is irrelevant. There have been federations of political units possessing very different forms of government and there is no reason why—there should not be again.

The first and most definite impression gained from a study of Indian constitutional documents on provincial autonomy or any cognate theme is that the whole subject suffers from a lack of precision. The problem of relieving the Central

*Indian problems* Government of part of its administrative burden has engaged  
*have usually been* the thoughts of His Majesty's  
*approached from a* Government, of the Govern-  
*practical point of* ment of India, and of independ-  
*view.....*

ent observers, from time to time. It has sometimes been approached, as Lord Ripon approached it, from the point of view of inviting Indians to share in the administration of their own country in order to educate them in responsibility. At other times, it has been envisaged solely as an essay in administrative convenience. Whether approached from the right or from the left, the steps taken were neither guided by definite principle

nor did they go far enough to compel any of the authorities concerned to make the attempt to see the subject of Indian constitutional reform as a whole. Neither the Decentralisation Commission of 1907, nor the Montagu-Chelmsford Report, nor the Report of the Joint Parliamentary Committee, nor the Despatches of the Secretary of State and of the Government of India on Indian Constitu-

..... and constitutional principle was at a discount. tional Reform, when the present Act was on the anvil, penetrated behind the political or administrative problem of the moment to those ultimate constitutional principles without which no satisfactory instrument of government can be made. The Englishman's refusal to build a bridge until he actually comes to the river bank is responsible for the elasticity of the British Constitution, but it entails certain risks in any country where the Constitution can only exist in the form of the written word of a Statute. As pointed out in an earlier Chapter, "The Government of India has at all events until recent times chiefly concerned itself with administration, and its preoccupation with this function has veiled from its eyes the fact that, since the Crown took over sovereign responsibility for India in 1858,



a constitutional problem of the first magnitude has been slowly incubating and has now reached a stage where a firm grasp of constitutional principle is the only security against costly errors." I do not know whether Mr. Lionel Curtis, when he conceived the ingenious device of the Transferred Subjects, realised that their administration would be the occasion for a study of Federalism; but it is quite clear that neither he nor those who accepted his design succeeded in defining either what they themselves intended, or what the experiment of the Transferred Subjects might entail. I am not here concerned with the merits of Dyarchy itself, but with the fact that, inasmuch as the Transferred Subjects represent the embryo of provincial autonomy, they are the *fons et origo* of this Monograph.

My instructions from the Government of India do not require me to draw up any new division of

*Greater precision  
needed in all defini-  
tions.* subjects between Central and Local Governments. The

conclusion, therefore, of this Monograph must be general, not particular. Now, the first impression which emerges from the study of the present Indian Constitution, in comparison with Federal Constitutions elsewhere,

is that the true line of division between the provinces and the Government of India still has to be drawn. There is a lack of definition in the line as drawn at present, where it is drawn at all; and that precision in the allotment of responsibility towards which every Federal Constitution strives is almost wholly lacking in the Government of India Act. This point is taken with unanimity by the Majority and the Minority of the Reforms Enquiry Committee, though with varying emphasis. It was clearly before the minds of the Committee on the Division of Functions, and it appears over and over again in the Despatches of the Government of India six years ago. It does not appear to have been so prominently before the minds of the authors of the Joint Report; and, as one of the authors of that Report was also one of the principal authors of the Act itself and showed himself more receptive to political than to constitutional pleas, it may be that he must be held in some degree responsible for the failure to foresee the perplexities which this lack of precision must engender.

Those who have read Chapters IV and VI will realise where that precision is most needed.

(1) Not only must the division of functions be clearly laid down in the Constitution itself, but there must be as little doubt as possible where the residuary powers of sovereignty actually lie.

*Certain essentials.*

(2) With the spheres of action defined, the next requirement is undoubtedly that each Government, Federal or Provincial, should be enabled by the possession of its own administrative agencies to make its will effective over the whole field allotted to it by the Constitution. The Diet of the Germanic Confederation, like the American Confederation of early days, failed because it possessed no instruments whereby it could establish direct contact with the individual citizen placed apparently under its authority. There can be no question that the policy recently pursued by the Government of India in drawing within its direct control the administration of Customs, Opium, Salt, Ports, and so on, is not only a step in the right direction but one which indicates the road upon which constitutional reform must proceed if India contemplates any kind of federal government.

(3) Inasmuch as a Federal Constitution, being a contract between parties with different functions and different interests, must be enshrined in the

solemn form of a special Statute, and as the Constitution is of necessity supreme over all other instruments of government, it must not be subject to too easy a process of amendment. This is equally true whether the amendment takes place as the result of enquiry by a Royal Commission, followed by an Act of Parliament, or whether it be made by some indigenous process in India. Indeed it is even truer in the latter event than the former. Here the need for precision is as great as in any other respect, for, if the process of amendment is merely that of ordinary legislative enactment, the essential element of deliberate and mature consideration is sure to be lacking. Without entangling the process of constitutional amendment in too great an elaboration of procedure, it is both possible and necessary to make the process long enough and deliberate enough to ensure that a given amendment represents the considered will of those entitled to alter the Constitution. Let me here invite a reference to Chapter V which describes the various ways in which constitutional amendment is undertaken in federal countries.

(4) It is also essential that, since no Constitution can foresee every contingency, the procedure

for settling doubts should be clearly laid down. At present under the Devolution Rules, the Government of India possesses an unfettered discretion in this matter ; and whether this function remains in future in the hands of the Central Government or whether it is transferred to a Federal Supreme Court, as under some Constitutions, it is most desirable that the procedure, in itself as simple as possible, should be laid down without qualification or ambiguity in the terms of the Constitution. A constitutional omission here may become the gateway to confusion.

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*The following list of books is manifestly incomplete, but it is given to show the sources from which this monograph is drawn. To the attentive reader I need hardly say that I owe the largest debts to Alexander Hamilton and to Lord Bryce. In the course of my argument I have not always acknowledged, either by inverted commas or by reference to any particular work, the exact nature of my debt.*

*The omissions from the following list, which will occur to anyone, must be a large part of my defence against those who find faults in the foregoing chapters.*

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